Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ERNEST A. JANIK, JR. INDIVIDUALLY, ON BEHALF OF GRANT JOSEPH JANIK, ON BEHALF OF TYLER NEWMAN JANIK; LEAH EILEEN JANIK, INDIVIDUALLY ON BEHALF OF GRANT JOSEPH JANIK, ON BEHALF OF TYLER NEWMAN JANIK,

Petitioners,

v.

AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; AND IAS CLAIM SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a clearly erroneous and serious miscarriage of justice is produced by the Fifth Circuit's practice of effectively ignoring or deleting the phrase **"other misconduct"**, as that phrase appears in ***Fed.R.Civ.P. Rule 60(b)(3)***, – by virtue of the 5th Circuit Court of Appeals denying ***Rule 60(b)(3)*** relief to a movant, unless that movant can clearly and convincingly prove some kind of **"fraud"** or **"misrepresentation"** in pre-trial discovery or in trial tactics, – as opposed to that court recognizing and remedying documented "unfair surprise" – predicated varieties of **"other misconduct"** that prevented the plaintiffs from "fully and fairly" litigating their claims in a partial summary judgment-limited case, – in a jury trial context wherein:

(A) such unfair surprises were based upon defendant's prejudicial failures to comply with the automatic disclosure requirements of ***Fed.R.Civ.P. Rules 26(a)(1)*** and ***26(e)(1)***;

and

(B) such unfair surprises were exacerbated by unfair document non-production and/or expert witness collusion, as well as improper partial summary judgments –

such that the 5th Circuit's current practice of ignoring the proffered evidence of such **"other misconduct"** justifies a ***Rule 60(b)(3)***-based reversal and remand for new trial, – because:

i) such a narrow construction of ***Rule 60(b)(3)***'s **"other misconduct"** phrase conflicts with the ***Rule 60(b)(3)***

QUESTION PRESENTED – Continued

norms recognized and enforced in other federal circuits (such as the 1st, 4th, 7th, 11th, and Federal Circuits), such that current disparity in applying *Rules 60(b)(3)*'s **"other misconduct"** phrase's proper meaning in the 5th Circuit requires correction, in order to avoid regional inequalities in enforcing *Rules 26(a)(1), 26(e)(1),* and *60(b)(3);*

and/or

ii) such a narrow construction of *Rule 60(b)(3)*'s **"other misconduct"** phrase represents a clearly erroneous view (and failure) of **5th Amendment**-based procedural Due Process;

and/or

iii) such a narrow construction of *Rule 60(b)(3)*'s **"other misconduct"** phrase reversibly compromises the proper ambits and applications of **7th Amendment** trial-by-jury rights.

PARTIES TO THE PROCEEDINGS

Although this litigation has involved the City of Dallas and a variety of insurance defendants, petitioners believe that only three defendants have an interest in this Petition for Writ of Certiorari, namely: **Amica Mutual Insurance Company; Nobel Service Corporation; and IAS Claim Services, Inc.**

The Petitioners herein are the plaintiffs below, **Ernest A. Janik, Jr. and Leah Eileen Janik, individually and on behalf of their minor sons, Grant Joseph Janik and Tyler Newman Janik.**

The defendants at the trial court level were seven: the **City of Dallas, Texas**, an incorporated municipality, plus the following six "insurance defendants" (whose d/b/a's are omitted as irrelevant to this appeal): **Amica Mutual Insurance Company**, a Rhode Island company, **Nobel Service Corporation**, a Delaware corporation **IAS Claims Services, Inc.**, a Delaware Corporation, **Nobel Holdings, Inc.**, a Delaware corporation (dismissed by summary judgment prior to trial), **Insurance Adjustment Services of Texas, Inc.**, a Texas corporation (dismissed by agreement), and **Floyd Myers** (dismissed by agreement).

Of the seven trial court level defendants, only the following four were parties at the circuit court of appeals level: the **City of Dallas, Texas, Amica Mutual Insurance Company, Nobel Service Corporation**, and **IAS Claim Services, Inc.** At the circuit court of appeals level there was one appeal that involved the **City of Dallas, Texas**, namely 5th Circuit Appeal No. **98-10781**, which followed

PARTIES TO THE PROCEEDINGS

a summary judgment favoring that city, *cert. denied* as No. 00-684 (2001).

A trial was had on some of the Janiks' claims against three of the insurance defendants. An appeal that did not include the City of Dallas as a party (but which arose from the same civil action) followed said trial, namely, 5th Circuit Appeal No. **98-11369**, and a related appeal, No. **99-11385**. This petition directly relates only to 5th Circuit Appeal No. **99-11385**.

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The district court and Fifth Circuit rulings listed are unpublished decisions. As copied in Appendix Part "A", they are:

Summary Calendar	1-11-2001 [*5th Cir.*];
Order	11-16-1999 [*#448*];
Mem. Opinion & Order	10-29-1999 [*#442*];
Order	11-19-1998 [*#419*];
Court's Charge/Verdict	[8-27-1998 [*#393*];
Order	2-22-2001 [*5th Cir.*];
Judgment	5-28-1998 [*#394*].

JURISDICTION

Petitioners' timely appeal in the court of appeals below was denied by an order entered **January 11, 2001** (see Appendix Part "A"). A timely petition for panel rehearing was thereafter denied by the Fifth Circuit panel by an order entered **February 22, 2001**. This Court's jurisdiction is now invoked under 28 U.S.C. § 1254(1), the certiorari statute.

FEDERAL LAWS INVOLVED

This litigation arose as a "federal question" suit involving Clean Water Act, and Resource Conservation & Recovery Act, but interpretations of those statutes are not directly relevant to this petition. Rather, the pivotal federal laws herein are: Fed.R.Civ.P., Rules 26(a)(1), 26(e)(1), 26(e)(2), 56(e), and 60(b)(3), as well as the U.S.

Constitution's 5th and 7th Amendments. The text of these laws are provided in **Appendix Part "B"**.

STATEMENT OF THE CASE

Procedural History. In this appeal (**Appeal #99-11385** in the Fifth Circuit) the Janiks were plaintiffs who requested post-trial relief under **Fed. R. Civ. P. Rule 60(b)(3)**, especially as to how Rule 60(b)(3) relates to various portions of Fed.R.Civ.P. Rule 26, especially the automatic production mandates[1] of Rules 26(a)(1), 26(e)(1), and 26(e)(2), as such may relate to Rule 60(b)(3) "misconduct". The trial court's decision (to deny Rule 60(b)(3) relief) was adopted by the Fifth Circuit panel, as the legal justification of that panel's affirmance of the trial court's denial of Rule 60(b) relief.

Statement of Relevant Facts. During 1993 untreated sewage wastewaters of the City of Dallas were, without warning, discharged in a manner not authorized by the city's EPA-issued Clean Water Act/NPDES permit ("polluter's permit"), with most of the wastewaters invading the home of the Janiks prior to its draining into the Trinity River. This physical invasion of the Janiks property by myriad gallons of untreated municipal sewage wastewaters, and airborne biohazardous contaminants therefrom, substantially and illegally interfered with the Janiks' use and enjoyment of their home and related personal property items, and sickened them. **Doc #85 @ 3-19**.

The Janiks were insured by AMICA. In connection with insurance claims timely filed by the Janiks, for property losses insured by AMICA (adjusted by IAS/NOBEL),

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[1] including insurance defense trial expert reports mandated by Fed.R.Civ.P. Rule 26(a)(2)(B).

the Janiks were treated deceptively and unfairly (**Doc #393 @ pages 22, 26, 29**), so the Janiks ultimately brought suit in 1995. At trial, the defendants' usage of quasi-scripted testimony about various topics not disclosed in expert report (*e.g., unproduced "#1 consumer ratings", and about AMICA's purported policy of "**giving insureds the benefit of the doubt**", etc.*) caused unfair surprises and prejudices to the Janiks' ability to fully and fairly litigate this case at trial. See **Docs #447** and **#446** (*see* **Appendix, Part "C"**, *showing verified support of kinds of prejudice to Janiks' trial preparation*).

REASONS FOR GRANTING THE PETITION

This federal question involves a "split" in the circuit courts of appeals on the proper usage of Rule 60(b)(3) – especially as it applies to remedying violations of Rule 26(a)(1) and Rule 26(e)(1), – obviously an important federal question directly related to 5th Amendment Due Process and 7th Amendment Trial by Jury safeguards. Contrast this case with, *e.g.*, Licciardi v. TIG Ins. Group, 140 F.3d 357 (1st Cir. 1998); United States v. One Douglas A-26B Aircraft, 662 F.2d 1372 (11th Cir. 1981); Schultz v. Butcher, 24 F.3d 626 (4th Cir. 1994); Fraige v. American-Nat'l Watermattress Corp., 996 F.2d 295 (Fed. Cir. 1993); Lonsdorf v. Seefeldt, 47 F.3d 893 (7th Cir. 1993); etc. (*See, accord,* Supreme Court Rule 10(a), regarding "conflicts" in the circuit courts of appeals.)

This case involves the combined effect of a "tilted" jury selection process with unfair surprises at trial that reveal either: (1) trial expert disclosure violations, such that the plaintiffs (Janiks) were *unfairly surprised* and unfairly prejudiced by the defendants' "hiding" discoverable information needed to "fully and fairly" litigate their insurance claims at trial; and/or (2) trial expert collusion.

For example, the following topics, among others, were surprisingly mouthed at trial by defense experts who never disclosed such positions before trial:

(a) **AMICA's so-called "#1 consumer ratings"**, see **Doc #447's pages 6, 8**, and **Doc #446** at **¶¶** 1m, 2a, 3i, 3k;

(b) **AMICA's "benefit of the doubt"** (to its insureds) **policy**, see **Doc #447's pages 5, 9**, and **Doc #446** at **¶¶** 1p, 1r, 2f, 3a, 3i, 3o, 3q, 3r, and 3s;

(c) **"generally accepted claims handling practices** see **Doc #447's pages 5, 12-13**, and **Doc #446** at **¶¶** 1o, 1p & 4b (*re "emergency service"*), 1s & 5 (*re tactics abusing insured rel. to privacy/confidentiality agreement*), 2b, 2d, 2e, 2g, 3d, 3f, 3g, 3h, 3j, 3m, 4a (*unproduced "phone log"*), 4d;

(d) **defense experts testifying outside of basis and opinions disclosed in Rule 26(a) expert reports**, see **Doc #447's page 11**, and **Doc #446** at **¶¶** 1b, 1c, 1d, 1e, and 3n;

(e) **defense attorneys' misuse of both opening and closing jury arguments**, see **Doc #446** at **¶¶** 1f, 1g, 2a, 2b, 2c, 2d, 2e, 2f, 2g, 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h, 3i, 3j, 3k, 3l, 3m, 3n, 3o, 3p, 3q, 3r, 3s; and

(f) the supposed **"100% germ-free"** demand, see **Doc #447's pages 5, 10**, and **Doc #446** at **¶¶** 1l, 2c, 3e, 3r;

(g) the **withholding the adjustor "re-cap notes"**, see **Doc #447's pages 4-5**, and **Doc #446** at **¶** 4c.

Please notice that the summary pages of the above-noted **Doc #447** and **Doc #446** [*such post-trial documents being verified declarations* **proving various Fed.R.Civ.P.** ***Rule 60(b)(3) issues***] are reproduced in **Part "C"** of this petition's **Appendix.** Also, the "trial by ambush" tactics were prejudicially exacerbated, because some prospective

jurors were screened out and eliminated by leading questions about whether they had ever felt cheated by an insurance company (*and thus might be inclined to be "unfair" to AMICA*), or whether they didn't like how any insurance claim was handled, – *as opposed to whether they have ever been cheated by AMICA in particular,* – or whether they leaned in favor of insurers or insurance claims adjustors (if they liked how their claims were handled).

The pivotal point here is that **the defendants have not indicated when and how they provided this information, via Rule 26 or via discovery responses.** They failed. This failure, in conjunction with their prepping their witnesses to all sing the same "songs" (see **Doc #443**), proves that the information was made available to the defendants' "outside" experts, yet was withheld from the Janiks – with the result being **"trial by ambush"**[2] on several material facts that combined to mislead and taint the jury. This Court should grant a reversal, to correct the Fifth Circuit's erroneous application of its improper standard for identifying and remedying Rule 60(b)(3) – relevant "other misconduct". The Fifth Circuit has rendered the phrase "other misconduct" empty. By not reaching (*much less directly discussing*) the critical criterion of Rule 60(b)(3)'s federal norm of **"other misconduct"** as acts not being limited to "fraud on the court" or to any willful discovery resistance, the Fifth Circuit panel ratified, and thus applied, an inaccurate legal standard when denying the Janiks' Rule 60(b)(3) motion, and the later motion to reconsider such. (*See* **Petition for Panel Rehearing @ 6-9.**)

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[2] Klonoski v. Mahlab, 156 F.3d 255 (1st Cir. 1998) (**trial by ambush justifies Rule 60(b)(3) relief to void unfair surprises**).

By adopting the trial court's errors in its legal conclusions, the Fifth Circuit has likewise reached conclusions (*and its affirmance*) on a clearly erroneous base.

A nationally problematic litigation crisis illustrated by this case *is the need for litigants to comply with* **the *automatic disclosure mandates of Rule 26(a)(1) and Rule 26(e)(1), and the concomitant need for federal courts* to enforce the rule-mandated obligations.** Thus, the appellate panel's ratification of the trial court's non-enforcement of such automatic disclosure requirements (i.e., those mandated by Rules 26(a)(1) and 26(e)(1)), constituted clear error. Also, the Fifth Circuit panel did not correct the trial court's error regarding prejudicial closing argument – the "ringing" of a bell that cannot be "unrung" once the jury has heard it. *Cf., accord,* Lonsdorf v. Seefeldt, 47 F.3d 893 (7th Cir. 1995) (***reversing a denial of Rule 60(b)(3) relief, due to tainting the jury by improper closing argument***). *See* **Petition for Panel Rehearing @ 6.**

Why are such discovery abuse matters **relevant** to Rule 60(b)(3)-based motions? Because part of each of the Janiks' Rule 60(b)(3) motions focused on surprise, *e.g.*, the undisclosed **"claims-handling documentation practices"** of AMICA (and of IAS/NOBEL), as well as the undisclosed **"customer satisfaction"** rating of AMICA, a supposed **"#1 consumer rating"** touted repeatedly at trial. These surprising opinion-"foundations" even appeared, at trial, from the mouths of "outside" defense experts who had never mentioned such in their Rule

26(a)-mandated expert reports![3] Moreover, AMICA had failed to otherwise provide any such documents during discovery (despite the Janiks' requesting such information via Rule 34 (see Doc #443). ***Defendants imply that Fed.R.Civ.P. Rule 26(a)(1) and Rule 26(e)(1) non-compliances can never constitute "other misconduct" under Rule 60(b)(3).*** Critically, the defendants ignore reply to plaintiffs' Rule 26(a) mandatory disclosure violation points. Some representative non-disclosed trial surprises are listed hereinbelow.[4]

To date, no appellate response brief cites any Rule 26(a) disclosure by any defendant that provided such "surprise" information, nor did any produced claim files include any such information. Compare this with 3RD AMENDED COMPLAINT allegations that triggered Rule 26(a) document disclosure duties, *e.g.*:

(a) **AMICA's so-called "#1 consumer ratings", see Doc #443's page 10** (re 3RD AMENDED COMPLAINT ¶ 48 and ¶ 38(g));

(b) **AMICA's "benefit of the doubt" policy, see Doc #443's page 10** (re 3RD AMENDED COMPLAINT ¶ 38(m));

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[3] *See* Licciardi v. TIG Ins. Group, 140 F.3d 357 (1st Cir. 1998) (**unfair surprise from expert who opined on a new area of testimony at trial, *defeating disclosure principle regulating expert reports,* was "highly prejudicial" and justified Rule 60(b)(3)'s new trial**).

[4] **Fed.R.Civ.P. Rule 26(a)(1) indicates that disclosures are mandated for documents "relevant to disputed facts alleged with particularity in the pleadings[.]"** *Complained-of noncompliances with Rule 26(a)(1) in this case* **also** *violated production-of-documents* **supplementation** *duties mandated by* **Rule 26(e)(1).**

(c) **"generally accepted claims handling practices, see Doc #443's pages 13-17** (re 3RD AMENDED COMPLAINT ¶ 38, ¶ 38(e), ¶ 38(f), ¶ 38(i), ¶ 38(j), ¶ 38(l), ¶ 38(m), ¶ 38(p), ¶ 38(q), ¶ 38(r), ¶ 43, ¶ 44, ¶ 45, ¶ 46, ¶ 48, ¶ 63, ¶ 72g, ¶ 72h, ¶ 72p, ¶ 72q, ¶ 72r, ¶ 72x, and ¶ 83);

(d) the supposed **"100% germ-free"** demand, **see Doc #443's page 19** (re 3RD AMENDED COMPLAINT ¶ 72g);

(e) the **withholding the adjustor "re-cap notes", see Doc #443's page 18** (re 3RD AMENDED COMPLAINT ¶ 43, ¶ 44, and ¶ 63); and

(f) **who 'IAS' is or was, see Doc #443's pages 11-12** (re 3RD AMENDED COMPLAINT'S ¶ 38(q), ¶ 46, ¶ 69, ¶ 74, ¶ 84, ¶ 84(h), ¶ 84(i), ¶ 84(l)).

Despite such pleadings by the Janiks, such Rule 26(a)(1)/(e)(1) disclosure productions by defendants never occurred. **These failures have not been refuted by any of the defendants,** who merely rely on denying that propounded discovery fairly "trapped" certain document categories, **necessarily implying that there existed no other legal duty to produce those documents!** See **Doc #443** (JANIKS' 11-15-1999 MOTION FOR REHEARING); see also **Doc #447** and **Doc #446**, provided via **Appendix Part "C"**.

Moreover, notwithstanding the district court's conclusory footnote #3 (*on page 3 of its 10-28-1999 ruling*), the Janiks did identify at the trial court level (*in Doc 443*) several portions of their pleadings that triggered Rule 26(a)(1)'s mandatory document disclosure requirements – as to AMICA's (and IAS/NOBEL's) "generally accepted"

claims-handling documentation practices[5] (see 3RD AMENDED COMPLAINT, ¶ 38, ¶¶ 38(e)-(f), ¶¶ 38(i)-(j), ¶¶ 38(l)-(m), and ¶¶ 38(p)-(q) *in Doc* #443).

Likewise, the Janiks' discovery requests should have "flushed out" AMICA's supposed reputation for "#1" customer satisfaction (see 3RD AMENDED COMPLAINT, ¶ 48, ¶ 38(g) and ¶ 38(m)).[6]

Regarding AMICA's undisclosed advertizing-related business reputation (*e.g., "#1 consumer ratings"* and *"AMICA always gave the insured the benefit of the doubt", which related themes were both buttressed by IAS/NOBEL's trial behavior*), AMICA and IAS/NOBEL both committed *discovery misconduct* that prevented the Janiks from "fully and fairly" preparing to litigate the triable issues at trial, thus violating Rule 60(b)(3) concerns, such that the trial conducted was not a fairly litigated contest of the triable issues.

Regarding AMICA's and IAS/NOBEL's improper, evasive, and willful refusal to timely provide production of the "IAS" claims adjustor's so-called "re-cap notes" –

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[5] **These were never produced,** – they were never disclosed in Rule 26(a)(2)(B)-required trial expert reports, neither were they otherwise disclosed by defense counsel prior to trial; – however, several defense experts testified of such at trial. The Janiks could not "fully and fairly" oppose such unfair trial surprises.

[6] This was never produced, despite proper discovery requests that should have "trapped" such information. These are only two illustrations of surprise testimony topics. See 99-11385's opening Brief pages 4-47 for more, which reasserts trial testimony surprises documented in Doc 443.

which were not produced timely to plaintiffs before the discovery cut-off deadline, – **so those "re-cap notes"** ***were not available to plaintiffs when they needed them, to defend against partial summary judgment motions*** (or to fully preparer the Janiks' experts' Rule 26(a) reports), AMICA and IAS/NOBEL both committed *discovery misconduct* that prevented the Janiks from fully and fairly preparing to litigate the triable issues at trial, such that the trial conducted was not a fairly litigated contest of the triable issues.

Thus, some of the Janiks' jury trial rights were deprived by partial summary judgments unwarranted by Rule 56(e), especially since the dismissed counts were not allowed fair discovery due to defendant discovery misconduct. *Accord* Brunet's "Summary Judgment Materials", at 147 F.R.D. 647, 656-657 (1993) (noting 56(e)'s substance-over-form test) *with* **Docs #116, #330, #394,** and **#418**. In other words, partial summary judgment-dismissed counts were unduly guillotined *due to records withheld from plaintiffs,* **and/or** *from "prepped" witness collusion,* either of which causes Rule 60(b)(3) problems. *Thus, a denial of the Rule 60(b)(3) Motion* reaffirms such improper partial summary judgments (*on counts that should have gone to the jury*), since *Rule 26(a)'s automatic disclosure obligations were ignored, facilitating unfairness.*

Plaintiffs were handicapped from a full and fair pre-trial process. For example, 1-6-1997 was the original deadline for all Rule 26(a)(2) expert reports (see **Doc #447**). See also **Doc #418**, page 13, ¶ 4c (*re IAS/NOBEL's Jene Montague's "re-cap notes" being provided to defendants' outside experts, yet were withheld from the Janiks*). This

"other misconduct" is undeniably demonstrated by a discovery dispute hearing – **on April 4, 1997** – whereat Magistrate Judge Kaplan ruled that the Janiks could not redesignate a rebuttal expert as a prima facie proof expert, – nor could the Janiks add another case-in-chief expert (which further enforced the 1-6-1997 expert designation deadline against the Janiks). **Doc 181, pages 3-4.**

Regarding AMICA's and IAS/NOBEL's evasive and dilatory obstructionism regarding **"who 'IAS' is/was"**, which directly related to agency law issues and apparent estoppel issues (*which related to misrepresentation issues, inter alia*), AMICA and IAS/NOBEL both committed discovery misconduct that prevented the Janiks from fully and fairly preparing to litigate the triable issues at trial.

The Janiks were prevented at trial from introducing evidence of Texas Deceptive Trade Practices Act ["DTPA"] liability in this very matter, because one of the Janiks' DTPA counts (against AMICA) was for AMICA's part in violating the identities-confusion DTPA provision (i.e., TEX. BUS. & COMM. CODE § 17.46, § 17.50, etc.), thus matching the content of **the Janiks' 3RD AMENDED COMPLAINT's pages 9-10, 47, 52, 68, 69, 71, 74-75, 84-85,** with said amended complaint alleging DTPA misconduct as violating Texas law. Yet, this DTPA-based liability jury issue was deleted by partial summary judgments, via two of the district court's rulings (**Doc #361** and **Doc #366**). These unfair partial summary judgments (*favoring the insurance defendants*) unplugged the Janiks' ability to introduce trial evidence of identity confusion-based liability based on Texas common law doctrines regarding improperly disclosed agent-principal relationships.

IAS/NOBEL actively resisted proper discovery requests on this topic, so IAS/NOBEL is also guilty of trying to *evade discovery* on this vital liability-relevant matter. (*See* **Doc #447 at Tab I,** in contrast to IAS/NOBEL witness testimony at **Tr. Vol. 6, page 160**).

The Fifth Circuit panel should have noticed that the defendants never denied that they never provided the Janiks with copies of anything written that defined the so-called **"generally accepted claims-handling practices"** that the defense witnesses (including "outside" experts) testified about. The only rational, fair conclusion the panel could make from the defendants' non-production and their non-disclosures (*combined with contradictory, surprising defense testimonies at trial*) is that either such written copies were wrongfully **withheld** from disclosure and discovery, or witness **collusion** occurred, via "prepping" of defense witnesses (*e.g., **"outside" experts who omitted such "#1 ratings" from their Rule 26 reports, yet sang the same "song" at trial**).[7] This clearly tainted the jury trial.*

The Janiks made discovery requests that encompassed this information, and presented evidence of how AMICA's non-productions hindered trial preparation, such as how the surprise trial theme that ***"AMICA routinely gave the benefit of the doubt to its insureds"*** (which defense experts treated as a "fact" on which their

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[7] Defense experts did not disclose any of these testimony surprises (*i.e., the "new" themes in expert opinions at trial*) by original inclusion in their Rule 26(a)(2)(B) expert reports or by any supplements thereof (*or by attorney disclosures*). Yet, these surprises were "milked" by defense counsel in closing argument.

expert opinions relied). This shows **either** withheld trial scripts **or else** unfair oral witness collusion. See Appellants' opening Brief @ 33-34 (re **Doc #443** and **Doc #447**, *citing examples of evasive discovery responses*); see JANIK's SUPPLEMENTAL DECLARATIONS,[8] at **Tab R** (re "reputation deception"/"#1 consumer ratings") and at **R-3** (documenting AMICA's evasive response to **request #34**). The plaintiffs exerted "due diligence" to overcome IAS/NOBEL's evasiveness in discovery. See Appellants' opening Brief @ 33-34 (re **Doc #443**'s incorporation of **Doc #447**, *illustrating evasive discovery responses from all 3 defendants*); see **Doc #447** at **Tab R** ("reputation deception" and "#1 consumer ratings") at **R-3**, *e.g.*, page JL-00598 (IAS/NOBEL's evasive response to **request #108**), page JL-00600 (IAS/NOBEL's evasive response to **request #113**). It is noteworthy that discovery evasiveness can be a basis for Rule 60(b)(3) relief,[9] and that such discovery misconduct need not demonstrate a "nefarious intent or purpose". Anderson v. Cryovac, 862 F.2d 910, 923 (1st Cir. 1988). Such defense misconduct was not merely "accidental"!

Significantly, Rule 60(b)(3) is **not** limited to if/when discovery misconduct was deliberately perpetrated by "fraud":

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[8] **Doc 447** (reproduced in part in RECORD EXCERPTS' **Tab H**), signed by Mr. Janik on 11-14-1999; filed with trial court 11-15-1999.

[9] Abrahamsen v. Trans-State Express, Inc., 92 F.3d 425, 428 (6th Cir. 1996) ("Our system of discovery was designed to increase the likelihood that justice will be served in each case, not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins the case").

> **For [*"other misconduct"*] to have meaning in the Rule 60(b)(3) context, it must differ from both "fraud" and "misrepresentation."** Definition of this difference requires us to take an expansive view of "misconduct." The term can cover even accidental omissions – [or] it would be pleonastic, because "fraud" and "misrepresentation" would likely subsume it. ***Cf. United States v. One Douglas A-26B Aircraft***, 662 F.2d 1372, 1374-75 n.6 (11th Cir. 1981). . . . We think such a construction not overly harsh; **it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial.** Accidents – at least avoidable ones – should be immune from the reach of the rule. [emphasis added]

MMAR Group, Inc. v. Dow Jones & Co., Inc., 187 F.R.D. 282, 285 (S.D. Tex. 1999), *quoting* Anderson v. Cryovac, 862 F.2d 910, 923 (1st Cir. 1988).

Moreover, the speculative assertion that the "benefit of the doubt" theme repeatedly parroted by defense witnesses" arose coincidentally (**"anecdotally"**) to AMICA's retained non-employee expert witnesses invites imagination-stretching beyond that of any reasonable U.S. court. (***Janiks' appellate Reply Brief @ 2-5.***) Rather, any fair reading of the trial testimony only suggests that the defense witnesses – including the "outside" retained experts (who were not employees of AMICA, a Rhode Island company), – were "prepped" on what to say about AMICA's business reputation, so that the litigation theme of "benefit of the doubt" would appear "coincidentally" out of the mouths of employees and retained experts alike, manipulating the jury with a scripted/false impression of AMICA's business reputation in "the industry".

The defendants' trial usage of quasi-scripted expert testimony on various topics not disclosed in expert reports (*e.g., unproduced* ***"#1 consumer ratings", and about AMICA's purported policy of "giving insureds the benefit of the doubt", etc.)*** caused unfair surprises and prejudices to the Janiks' ability to "fully and fairly" litigate this case at trial. See **Doc #447 @ 8-9** (documenting verified support of kinds of prejudice to Janiks' trial preparation). As shown above, the district court acted as though Rule 60(b)(3) relief can only be grounded on direct proof that an opposing party committed "fraud" or a "withholding of responsive discovery" that was **either** willful non-compliance with Rule 26(a)(1), **or** a willful non-compliance with Janiks' "proper discovery requests".

Although the Janiks have documented both of these (*e.g.*, **Doc #443**), the legal test does not require the Janiks to prove some kind of "fraud" scienter. **However, the Rule 60(b)(3) test is whether the defendants' behavior failed to fulfill their disclosure obligations and/or their discovery obligations, – not why they so failed.** *See, accord,* Schultz v. Butcher, 24 F.3d 626 (4th Cir. 1994) (failure to produce relevant documents can be Rule 60(b)(3) "misconduct" even if the failure to produce is inadvertent); Fraige v. American-Nat'l Watermattress Corp., 996 F.2d 295 (Fed. Cir. 1993) (new trial under Rule 60(b)(3) is needed to avoid condoning opponent's misconduct).

The pivotal point here is that **the defendants have never indicated when and how they provided this information via Rule 26 or via discovery responses.** They failed. This failure, in conjunction with their prepping their witnesses to all sing the same "songs" (see **Doc**

#443), proves that the information was made available to the defendants' "outside" experts, yet was withheld from the Janiks – with the result being **"trial by ambush"**[10] on several material facts that *combined to unfairly mislead and taint the jury.*

Thus, the district court and the appellate panel both committed **"abuse of discretion"** by its two denials of the Janiks' Rule 60(b)(3)-based motions, **(1)** because basing a dispositive ruling on incorrect legal conclusions is an abuse of discretion, and **(2)** because basing a dispositive ruling on clearly erroneous material facts is an abuse of discretion. See Broyhill Furniture Industries, Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080 (Fed. Cir. 1993), *following* A.C. Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020, 1039, 22 U.S.P.Q.2d (BNA) 1321, 3333 (Fed. Cir. 1992) (en banc). Therefore, it was manifest error for the Fifth Circuit to let the defendants "get by" with violations of Fed.R.Civ.P. Rule 26, all such violations being documented with references and quotations, in the Janiks' "MOTION TO RECONSIDER" (**Doc 443**, filed 11-15-1999, – which documentation was herein reasserted on 2-10-2000 (*i.e., in the Janiks' opening Brief for Appeal 99-11385*), yet this **combination of prejudicial surprises** has gone, thus far without any meaningful discussion either by the district court or by the affirming Fifth Circuit appellate panel. Only this Court can require the attorneys and the parties to "play by the [*federal*] rules"; without such enforcement the miscarriage of justice becomes commonplace, with rule violators (*e.g., testifying*

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[10] Klonoski v. Mahlab, 156 F.3d 255 (1st Cir. 1998) **(trial by ambush justifies Rule 60(b)(3) relief to void unfair surprises)**.

experts who add new surprises at trial[11]) being repeatedly rewarded for violating.

Thus, by adopting the trial court's Rule 60(b)(3) opinion, the Fifth Circuit ratified and perpetuated said abuse of discretion. **Lamentably, the effect of the appellate panel's ruling is to facilitate, by denying Rule 60(b)(3) relief, unchecked misconduct that functions like a federal "license" to evade Rule 26 compliance.** In other words, the effect of denying a Rule 60(b)(3) new trial is to provide the insurance defendants in similar cases with a *de facto* procedural permit to withhold relevant disclosure-mandated information (*from the surprised insureds*) and/or to provide witness collusion "scripting", for trials by ambush. This refusal to grant due Rule 60(b)(3) relief defeats the principle of "full and fair" litigation, – in contradiction of the federal policy discussed in Rule 60(b)(3) cases such as Klonoski v. Hahlab, 156 F.3d 255 (1st Cir. 1998), wherein the First Circuit prudently observed:

> If continuances were granted as a matter of course for violations of Rule 26(e)(1), the rule could always be disregarded with impunity . . . if we were to condone the procedure followed by the defendants in this case, then what everyone would do in order to avoid the necessity of disclosing materials that are particularly good for ambushing the other side is not do their investigation until time of trial.

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[11] Also, defense counsel utilized such surprise testimony "opinions" and "facts" self-servingly during closing jury argument.

Accord, see also Licciardi v. TIG Ins. Group, 140 F.3d 357 (1st Cir. 1998) (unfair surprises at trial by testifying experts sometimes cannot be cured by a continuance); Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281 (1st Cir. 1993) (supposedly "impeachment-only" information should have been produced; judgment vacated and new trial ordered); Hickman v. Taylor, 329 U.S. 495, 500-501 (1947) (pre-trial discovery procedures are supposed to reduce the possibility of surprise); United States v. Proctor & Gamble, 356 U.S. 677, 682 (1958) ("a fair contest" is the goal; the discovery rules are supposed to prevent trial from being "a game of blindman's bluff").

Moreover, regarding (1) AMICA's and IAS/NOBEL's undisclosed (*prior to trial*) collusive usage of a so-called **"100% germ-free"** requirement theme at trial, as well as (2) collusive usage of a so-called **"generally accepted claims handling practices"** standard that IAS/NOBEL purportedly practiced, AMICA and IAS/NOBEL both committed discovery misconduct that *prevented* the Janiks from "fully and fairly" preparing to litigate the triable issues at trial, such that the trial conducted was not a fairly litigated contest of the triable issues. AMICA tries to explain the same-song testimony from its witnesses by saying the (*coincidentally similar*) testimony on this topic "appears to be based on anecdotal information exchanged among the various defense witnesses" (AMICA appellate Brief @ 35, 36), – **but isn't such "anecdotal" opinion-expansion just a euphemism for "witness collusion"?**

IAS/NOBEL suggest, in effect, that this issue doesn't justify Rule 60(b)(3) relief, because "it presupposes that some 'document' containing the ["generally acceptable claims handling practices"] standards existed" (IAS/

NOBEL appellate Brief @ 33). However, the "harmony" of same-song-singers (about "100% germ-free") at trial necessarily presupposes some kind of paper-basis for this theme that was **"coincidentally" parroted by "outside" witnesses from geographically removed sources**, a "harmony" that clashed with the documents actually produced by defendants,[12] or else witness collusion.

AMICA and IAS/NOBEL, despite the automatic disclosures mandated by Rule 26(a),[13] and despite direct relevance to the parties' live pleadings and discovery requests, failed to produce any document indicating that the Janiks ever demanded a "100% germ-free" cleaning of their sewerage-germ-exposed property items. Yet, magically, their own out-of-town defense experts obviously relied upon such documents (or else some kind of undisclosed collusion) as a partial basis for their trial testimony on this theme. Despite such "fact" being **absent** from defense expert Shumaker's Rule 26 report, **it surprisingly pops up** in his trial testimony (**Tr. Vol. 6, page 244**). Likewise, such "fact" is ***absent*** from defense expert Quinn's Rule 26 report, ***yet it surprisingly pops up*** in his trial testimony, out-of-the-blue, as a "zero bacteria" demand imputed to Mr. Janik (**Tr. Vol. 7A, pages 42-43, 46**). So, apart from collusively pre-scripted testimony "cues", how can this unfairly surprising theme **"coincidentally"** emerge from the various mouths of the defense witnesses, at trial, with no discovery foundation (*and no*

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[12] See § G-3 within **Doc #446** filed 11-15-1999.

[13] **Both AMICA and IAS/NOBEL avoid arguing about how Rule 26(a)-mandated disclosure noncompliance can trigger Rule 60(b)(3) relief.**

other meaningful disclosure) that appears to justify such a chorus-like harmony in testimony? (*e.g.*, **Tr. Vol. 6, pages 30, 52, 78, 156, 165, 207-208, 210, 244).**[14] **Testimony "scripts" (or some other kind of yet-unproduced "recap"-like expert "testimony outline" notes, never produced to Janiks) must have been used to produce the same-song trial results.** Otherwise, how can out-of-town experts "coincidentally" use opinion foundations that assumed that Mr. Janik demanded a **"100% germ-free"** cleaning? Ambush-like, these out-of-town experts' opinion "foundatoins" were never disclosed or otherwise produced (by a Rule 26(e)(1) report supplementation or otherwise).

Likewise, AMICA and IAS/NOBEL never disclosed or produced any documents (to date) showing, defining, or describing the standards of what are ***"generally accepted claim handling practices"***, – and AMICA also failed to provide any documents that opined, advertised, or objectively demonstrated that it routinely ***"gave the benefit of the doubt"*** to an insured's disputed claim, – yet AMICA repeatedly used expert testimony citing such as being AMICA's standards, – and defense experts Shumaker apparently relied upon such "standards" in his Rule 26 expert report, and such "standards" (*which "standards"*

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[14] Even despite the unfair surprise testimony at trial, the plaintiffs' cross-examination did show that the purported "100% germ-free" demand was contradictable (**Tr. Vol. 7A, pages 42-43**). Were it not for this late-hour unfair surprise "ambush", the cross-examination would have been more effectively focused on this new information, and thus the Janiks' rebuttal testimony could have been "fully and fairly" planned (and trial-time-budgeted) for.

plaintiffs requested copies of during discovery, yet never received such) as a partial basis for defense expert trial testimony, – as appears in expert Shumaker's Rule 26 report and trial testimony (*e.g.*, AMICA's direct in **Tr. Vol. 6, pages 252-253,** as well as IAS/NOBEL's direct in **Tr. Vol. 6, page 257,** and during closing argument, **Tr. Vol. 7B, pages 53-54**).

How can such a chorus-like harmony have emitted from the mouths of out-of-town expert witnesses – on the same undocumented, undisclosed, unproduced theme, – apart from pre-trial "scripting" collusion? Moreover, if no such documents/information exist now (defendants say no such documents now exist), is that because such "testimony scripts" have been quietly **spoliated**? What did the "outside" defense experts rely on for their "fact" basis to support such trial testimony? What disclosure-mandated information was not provided to the Janiks before trial?

Or, if no such documents ever existed, due to a joint defense counsel strategy to orally "script" such "foundation facts" to out-of-town experts, – by "coaching" talks that always avoided saying anything discoverable in writing, – isn't that a Due Process-tainting form of **collusive testimony "misconduct"** (*and a functional equivalent of evasively withholding discoverable documents*), that are "coached" for usage as "foundation facts" for an expert's trial opinions? **Is not such orchestrated usage of such obviously collusive testimony an adequate "other misconduct" ground for Rule 60(b)(3) justice and relief?** In other words, the "no-such-documents-exist" defense, *q.v.*, relied upon by the Fifth Circuit in its MEMORANDUM OPINION AND ORDER OF **10-29-1999** at **page 3**, saying: *"More important, they have not established that any such documents*

even exist"; – and: *"Without showing that these documents exist, the Janiks cannot demonstrate that defendants improperly withheld them"*), – may answer the "withholding documents" problem, **but only to prove that a worse form of abuse occurred**, i.e., WITNESS TESTIMONY COLLUSION.

The district court failed to meaningfully consider (and to grant) plaintiffs' 11-15-1999 Motion to Reconsider Rule 60(b)(3) relief, *despite that said reconsideration motion showed how the 10-29-1999-entered denial ruling conflicted with the evidentiary record*, so it was error to affirm a denial of the 11-15-1999 Motion to Reconsider which sought Rule 60(b)(3) relief for Janiks. However, the Janiks had propounded many specific discovery requests, repeatedly, striving to "trap" various types of withheld documents and categories of information that were either never produced/disclosed by the defendants, – or were produced in a prejudicially dilatory manner so that the Janiks could not designate another expert to criticize such withheld documents' verisimilitude. (**Doc #181**, pages 3-4; **Doc #447** at **pages 3-13**, pages 7-13; **Doc #447's Tab A, Tab D** (@ *D-2, D-3, D-4*), **Tab G** (@ *G-2, G-3, G-4*), **Tab I** (*I-2, I-3, I-4*), **Tab P** (*P-A, P-I*), **Tab R** (@ *R-2, R-3, R-4*), **and Tab X.**

The Janiks' 11-15-1999 Motion to Reconsider raised new and important issues (*as well as reiterating prior issues missed by earlier rulings*), – yet the trial court did not meaningfully consider, as is shown on pages 28-48 of the Janiks' opening APPELLANTS' BRIEF. For example, in **Doc #419**, the trial court ignored **Rule 60(b)(3)** entirely, basing its denial solely upon the outcome-determinative

norm of **Rule 60(b)(2)**.[15] **Tab G** in Janiks' RECORD EXCERPTS herein. This error was raised by the Janiks' POST-TRANSCRIPT RULE 60(B)(3) MOTION (**Doc #437**), so that the trial court could reevaluate the 11-18-1999-filed evidence, using Rule 60(b)(3) norms. But, the trial court then denied this reconsideration motion (**Doc #437**), by **Doc #442** and **Doc #448**, while using an improper legal standard therefor, – finding no proof of specific discovery abuses, – and also finding no complaint allegations that triggered the automatic disclosure mandates of Rules 26(a)(1) and 26(e)(1), etc.[16]

However, the Janiks had already provided such specifically categorized discovery abuse documentation via **Doc #418** (*which the trial court ignored*), the Janiks' 11-18-1999-filed proof (**Doc #418** was the 11-18-1998-filed DECLARATION that provided verified support for the pre-transcript Rule 60(b) motion, **Doc #417**). Moreover, discovery documentation within Janiks' **Doc #418** was incorporated by reference into **Doc #437**, the very post-trial motion that the trial court denied as being "undocumented" via its **Doc #442**. This reference explicitly requested that the court consider Rule 60(b)(3) norms (see **Doc #437**, @ 11, ¶ 6). *Accordingly, **the Janiks did provide specific discovery abuse documentation with their Rule 60(b)(3) Motion**, as well as show how they would have responded to such undisclosed information.* Also, the Janiks

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[15] See ¶ 6 to ¶ 9, pp. 11-12, **Doc #437**, in **Tab J** of RECORD EXCERPTS.

[16] *See, e.g.*, **Doc #442's page 3 (saying "Absent proof of a specific request and the withholding of responsive discovery, however, plaintiffs are not entitled to relief").**

clarified and expanded their Rule 26(a)(1)-based complaint within **Docs #417** and **#418**, – both of which motions were nevertheless immediately denied via **Doc #419**, in so quick and so cursory a manner as to clearly demonstrate *arbitrary and capricious* abuse of Rule 60 discretions.

CONCLUSION

The trial court's own reasoning (*which was adopted by the Fifth Circuit panel, without significant discussion)* is defective in various aspects – aspects that were challenged at the trial court level (by Janiks' 11-15-1999-filed "Motion to Reconsider", which reasserts proof provided via Janiks' declaration filed 11-18-1998), as well as in Janiks' opening Brief to the Fifth Circuit (*e.g.*, 2-10-2000-filed Brief, pp. 4-47).

It was clearly plain error to avoid addressing (discussing) these issues that were raised in the Janiks' appellate Brief, especially since they were not at all meaningfully addressed in the trial court's two Rule 60(b)(3) rulings (i.e., the two rulings being appealed herein).

The Fifth Circuit manifestly erred by not addressing (much less discussing) the witness collusion problem, i.e., the "same song" necessarily proves either document withholding or else witness collusion "scripting", because one or the other was the cause for tainting defense usage of trial expert testimony for "same-singing" opinion surprises.

Also, by affirming the denial of the Janiks' Rule 60(b) motions, the appellate court effectively indicated that compounded examples of discovery abuses are, in effect, "no big deal", so long as plaintiffs cannot easily trace proximately caused damages thereto.

The affirmance of combined rulings below (*involving Rule 56, Rule 59, Rule 60(b), and* **Doc #394***'s quasi-JNOV result*) deprived plaintiffs of 7TH AMENDMENT jury trial rights (*and of 5TH AMENDMENT DUE PROCESS rights*).

So, the Janiks respectfully seek a Writ of Certiorari to issue to the Fifth Circuit Court of Appeals, and, in turn, for other favorable Rule 60(b)(3) relief.

Respectfully submitted,

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Supreme Court, U.S.
FILED

001739 MAY 22 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-11385
SUMMARY CALENDAR

ERNEST A. JANIK, JR., INDIVIDUALLY, ON BEHALF OF GRANT JOSEPH JANIK, ON BEHALF OF TYLER NEWMAN JANIK; LEAH EILEEN JANIK, INDIVIDUALLY, ON BEHALF OF GRANT JOSEPH JANIK, ON BEHALF OF TYLER NEWMAN JANIK;
Plaintiffs-Appellants,

v.

CITY OF DALLAS, TEXAS, ETC., ET AL.,
Defendant,

AMICA MUTUAL INSURANCE CO., A RHODE ISLAND COMPANY; NOBEL SERVICE CORPORATION, A DELAWARE CORPORATION DOING BUSINESS AS INSURANCE ADJUSTMENT SERVICES INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

(Filed Jan. 11, 2001)

(3:95-CV-2594-D)

Before REYNALDO G. GARZA, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:[1]

The appellants, Ernest A. Janik, Jr., et al. (collectively "Janiks") appeal the federal district court's denial of their Fed. R. Civ. P. 60(b)(3) motion for relief from judgment and their respective motion to reconsider. For the reasons stated below, we affirm.

In the fall of 1993, the Janiks were renting a home in Dallas, Texas. On October 31, 1993, the Janiks discovered raw-untreated sewage coming up through one of their home's shower drains. The Janiks notified AMICA Mutual Insurance Co., ("AMICA"), the insurance company which had issued them their renter's insurance, of their problem and made a claim. AMICA hired Insurance Adjustment Services, Inc. ("IAS") to process the Janiks' claim.

Inevitably, disputes erupted between the Janiks and IAS and AMICA concerning the handling of the Janiks' claim. AMICA, however, ultimately paid the Janiks $60,000 for their unscheduled personal property damage, the policy limits for unscheduled personal property damages, and $4,425 for additional living expenses. Dissatisfied, the Janiks filed suit against the City of Dallas, AMICA, and IAS.

The federal district court dismissed all of the Janiks' claims against the City of Dallas and several, but not all, of their claims against AMICA and IAS. The Janiks

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[1] Pursuant to 5th Cir. R. 47.5, this Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

appealed the dismissal. The Janiks proceed to trial with their remaining claims against AMICA and IAS. The jury found AMICA and IAS liable. The federal district court, however, entered judgment in favor of AMICA and IAS on the basis that there was no causal link between the liability finding and the damages finding. The Janiks appealed this ruling. On January 26, 1999, the two appeals were consolidated. On July 6, 1999, a panel of this court, in an unpublished opinion, affirmed the federal district court.

The Janiks, on August 30, 1999, filed a Fed. R. Civ. P. 60(b)(3) motion for relief from judgment. The federal district court considered the motion and denied it. The Janiks then filed a motion to reconsider. The federal district court considered the motion and denied it. On December 19, 1999, the Janiks filed their notice of appeal as to these two rulings.

Having reviewed the parties' briefs, the record, and the applicable authority, we AFFIRM the denial of the Janiks' motion for relief from judgment and their motion to reconsider based on the federal district court's opinion which is attached hereto as appendix A.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., et al.,	§	Civil Action No.
	§	3:95-CV-2594-D
Plaintiffs,	§	
	§	
VS.	§	
	§	
CITY OF DALLAS, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Plaintiffs Ernest A. Janik, Jr., et al. ("the Janiks") move pursuant to Fed. R. Civ. P. 60(b)(3) for relief from judgment, contending that defendants AMICA Mutual Insurance Company ("AMICA"), and Nobel Service Corporation and IAS Claims Services, Inc. ("IAS") ("the IAS/Nobel defendants"), engaged in misconduct by withholding requested discovery and by utilizing expert testimony that exceeded the scope of the expert's report. The court denies the motion.[1]

1

Plaintiffs sued various defendants arising from an incident in which sewage backed up into their leased home. They alleged *inter alia* claims for breach of contract, bad faith insurance practices, negligence, gross negligence, civil conspiracy and violations of the Texas

[1] Despite the pendency of consolidated appeals in this case, the court has jurisdiction to deny this motion.

Insurance Code. Following a jury trial, the court entered judgment in defendants' favor.[2]

Plaintiffs maintain that defendants committed misconduct by (1) withholding information relevant to customer satisfaction with AMICA, (2) perpetrating wasteful deception and prejudicial confusion about who IAS is or was, (3) withholding critical re-cap notes, (4) failing to produce any documents indicating that the Janiks had demanded a "100% germ-free" cleaning of their property, (5) failing to produce any documents defining or describing what are "generally acceptable claim handling practices" (and by AMICA's failing to produce any documents that opined, advertised, or objectively demonstrated that it routinely gave the benefit of the doubt to an insured's disputed claim), and (6) utilizing expert testimony that strayed from the expert's Rule 26 report. Ps. Mot. at 2-10.

II

A

A motion for relief under Rule 60(b) is extraordinary. *Washington v. Patlis*, 916 F.2d 1036, 1038 (5th Cir. 1990). "That spirit of finality which is implicit in all judgments, commands that courts be cautious in exercising the discretion vested in them to reopen proceedings for a new trial." *Id.* (quoting *Ag Pro, Inc. v. Sakraida*, 512 F.2d 141, 143 (5th Cir. 1975), *rev'd on other grounds*, 425 U.S. 273 (1976)). "The purpose of the rule is to afford parties relief

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[2] The court had earlier entered summary judgment in favor of defendant City of Dallas.

from judgments which are unfairly obtained, not those which may be factually incorrect." *Government Fin. Servs. One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 772 (5th Cir. 1995) (quoting *Diaz v. Methodist Hosp.*, 46 F.3d 492, 496 (5th Cir. 1995)).

"A party making a Rule 60(b)(3) motion must establish by clear and convincing evidence (1) that the adverse party engaged in fraud or other misconduct and (2) that the misconduct prevented the party from fully and fairly presenting his case." *Government Fin. Servs.*, 62 F.3d at 772 (quoting *Washington*, 916 F.2d at 1039, and *Montgomery v. Hall*, 592 F.2d 278, 278-79 (5th Cir. 1979)). A party may engage in Rule 60(b)(3) misconduct "if he fails to disclose evidence he knows about and the production of such evidence was clearly called for 'by any fair reading of the discovery order.' " *Government Fin. Servs.*, 62 F.3d at 772-73 (quoting *Montgomery*, 592 F.2d at 279).

B

1

The Janiks allege that AMICA presented trial evidence regarding consumer satisfaction. They must first show that the conduct about which they complain constitutes fraud or misconduct under Rule 60(b)(3). Although they contend that AMICA did not disclose this evidence during discovery, they have not established that they ever requested the information. *See* Ps. Mot. at 2-3. They simply aver that AMICA did not produce the documents "despite related proper discovery requests." *Id.* at 2; Ps. br. at 2. Absent proof of a specific request and the withholding of responsive discovery, however, plaintiffs are

not entitled to relief. *See Chrysler Corp. v. Superior Dodge, Inc.*, 83 F.R.D. 179, 195-96 (D. Md. 1979). The court holds that they have failed to meet their burden of showing that AMICA engaged in misconduct regarding evidence of consumer satisfaction.[3]

Additionally, although to obtain Rule 60(b)(3) relief the Janiks need not prove that the outcome of the trial would have been different absent the defendants' alleged misconduct, they must show that the misconduct prevented them from fully and fairly presenting their case. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1973). The Janiks have not met this burden. They concede that they "could have provided impeachment evidence at trial, regarding customer complains against AMICA." Ps. Mot. at 3 n.4. They appear to argue that they did not want "to use their precious Court-meted-out trial minutes" for this purpose. *Id.* They have failed reasonably to argue that the alleged withholding of such information prevented them from a full and fair presentation of their case because they not only maintain that they had impeachment evidence at trial, but also concede that they opted not to use it.

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[3] Plaintiffs appear to argue in their reply brief that disclosure was mandated by Rule 26(a)(1) and/or this court's Civil Justice Expense and Delay Reduction Plan. *See* Ps. Rep. Dr. at 3. Rule 26(a)(1), however, requires, in relevant part, that a party disclose matters that are "relevant to disputed facts alleged with particularity in the pleadings[.]" *See* Rule 26(a)(1)(A) and (B). The Janiks do not cite where in their complaint they alleged with particularity a disputed fact that would have required such production. Nor have they cited a specific provision of the court's Civil Justice Expense and Delay Reduction Plan that would have required such disclosure.

2

The Janiks assert that IAS/Nobel committed "wasteful deception and prejudicial confusion about 'who IAS is/was.' " They have failed to show by clear and convincing evidence that IAS/Nobel committed any misconduct. According to the Janiks, they were confused by the complicated chronology that defendants provided them. They maintain that David Terry's ("Terry's") testimony that IAS in this case referred to IAS Claim Services reveals deceit on the part of IAS/Nobel. Ps. Mot. at 5. Any differences between defendants' chronology, *see* ps. Mot. Ex. B., and Terry's testimony do not suffice to meet their Rule 60(b)(3) burden. *See Washington,* 916 F.2d at 1039 (holding that conflicting testimony does not constitute clear and convincing evidence of fraud under rule 60(b)(3)). And the Janiks have not in any event shown that this difference prevented them from fully and fairly presenting their case. Nothing precluded them from cross-examining Terry regarding any alleged inconsistencies between the IAS/Nobel corporate history and Terry's interpretation of "who IAS is/was."

3

The Janiks also maintain that defendants committed misconduct by withholding critical re-cap notes. Ps. Mot. at 6. They have failed to show that they were prevented from fully and fairly presenting their case. They obtained the notes almost one year prior to trial and their expert discussed the notes in his supplemental report. *See* AMICA Resp. Ex. C. at ¶ 11a.

4

The Janiks contend that defendants failed to produce documents relating to their demands for a "100% germ-free" cleaning. They have not shown that they requested documents relating to their germ-free demands.[4] More important, they have not established that any such documents even exist. They have failed to establish that defendants engaged in misconduct.[5]

5

Plaintiffs have not demonstrated that any documents existed regarding generally acceptable claims handling practices or AMICA's policy of giving "the benefit of the doubt to the insured." Without a showing that these documents exist, the Janiks cannot demonstrate that defendants improperly withheld them. Such standards can be followed in an industry without generating documents that are within the possession, custody, or control of a party.

6

Finally, the Janiks contend that defendants' expert's testimony strayed from his report. This cannot possibly

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[4] Plaintiffs advert to "Rule 26." *See* Ps. Mot. at 7; Ps. Br. at 3. Yet, as the court explains *supra* at note 3, they do not cite where in their complaint they alleged with particularity a disputed fact that would have required such production.

[5] If the Janiks' point is that no such documents in fact existed, then that was a matter for trial impeachment, not for a post judgment Rule 60(b)(3) motion.

serve as a basis for relief under rule 60(b)(3), especially since they had the opportunity to, and did, raise this assertion by trial objection. If the expert testified improperly, the court erred reversibly in overruling the objection, and plaintiffs properly preserved error, the appellate court can correct the error on appeal.

* * *

Plaintiffs' motion for relief under 60(b)(3) is denied.[6]

SO ORDERED.

October 28, 1999.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

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[6] Plaintiffs' request for oral argument is denied. *See* N.D. Tex. Civ. R. 7.1(g).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR, et al.,	§	
Plaintiffs,	§	Civil Action No.
VS.	§	3:95-CV-2594-D
CITY OF DALLAS, et al.,	§	
Defendants.	§	

ORDER

(Filed Nov. 15, 1999)

(Doc #448, entered Nov. 16, 1999)

Plaintiffs' November 15, 1999 motion to reconsider is denied.

SO ORDERED.

November 15, 1999.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., et al.,	§	Civil Action No.
	§	3:95-CV-2594-D
Plaintiffs,	§	
	§	
VS.	§	
	§	
CITY OF DALLAS, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Oct. 28, 1999)

(Doc #442, entered Oct. 29, 1999)

Plaintiffs Ernest A. Janik, Jr., et al. ("the Janiks") move pursuant to Fed. R. Civ. P. 60(b)(3) for relief from judgment, contending that defendants AMICA Mutual Insurance Company ("AMICA"), and Nobel Service Corporation and IAS Claims Services, Inc. ("IAS") ("the IAS/Nobel defendants"), engaged in misconduct by withholding requested discovery and by utilizing expert testimony that exceeded the scope of the expert's report. The court denies the motion.[1]

I

Plaintiffs sued various defendants arising from an incident in which sewage backed up into their leased

[1] Despite the pendency of consolidated appeals in this case, the court has jurisdiction to deny this motion.

home. They alleged *inter alia* claims for breach of contract, bad faith insurance practices, negligence, gross negligence, civil conspiracy and violations of the Texas Insurance Code. Following a jury trial, the court entered judgment in defendants' favor.[2]

Plaintiffs maintain that defendants committed misconduct by (1) withholding information relevant to customer satisfaction with AMICA, (2) perpetrating wasteful deception and prejudicial conclusion about who IAS is or was, (3) withholding critical re-cap notes, (4) failing to produce any documents indicating that the Janiks had demanded a "100% germ-free" cleaning of their property, (5) failing to produce any documents defining or describing what are "generally acceptable claim handling practices" (and by AMICA's failing to produce any documents that opined, advertised, or objectively demonstrated that it routinely gave the benefit of the doubt to an insured's disputed claim), and (6) utilizing expert testimony that strayed from the expert's Rule 26 report. Ps. Mot. at 2-10.

II

A

A motion for relief under Rule 60(b) is extraordinary. *Washington v. Patlis*, 916 F.2d 1036, 1038 (5th Cir. 1990). "That spirit of finality which is implicit in all judgments, commands that courts be cautious in exercising the discretion vested in them to reopen proceedings for a new

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[2] The court had earlier entered summary judgment in favor of defendant City of Dallas.

trial." *Id.* (quoting *Ag Pro, Inc. v. Sakraida,* 512 F.2d 141, 143 (5th Cir. 1975), *rev'd on other grounds,* 425 U.S. 273 (1976)). "The purpose of the rule is to afford parties relief from judgments which are unfairly obtained, not those which may be factually incorrect." *Government Fin. Servs. One Ltd. Partnership v. Peyton Place, Inc.,* 62 F.3d 767, 772 (5th Cir. 1995) (quoting *Diaz v. Methodist Hosp.,* 46 F.3d 492, 496 (5th Cir. 1995)).

"A party making a Rule 60(b)(3) motion must establish by clear and convincing evidence (1) that the adverse party engaged in fraud or other misconduct and (2) that the misconduct prevented the party from fully and fairly presenting his case." *Government Fin. Servs.,* 62 F.3d at 772 (quoting *Washington,* 916 F.2d at 1039, and *Montgomery v. Hall,* 592 F.2d 278, 278-79 (5th Cir. 1979)). A party may engage in Rule 60(b)(3) misconduct "if he fails to disclose evidence he knows about and the production of such evidence was clearly called for 'by any fair reading of the discovery order.' " *Government Fin. Servs.,* 62 F.3d at 772-73 (quoting *Montgomery,* 592 F.2d at 279).

B

1

The Janiks allege that AMICA presented trial evidence regarding consumer satisfaction. They must first show that the conduct about which they complain constitutes fraud or misconduct under Rule 60(b)(3). Although they contend that AMICA did not disclose this evidence during discovery, they have not established that they ever requested the information. *See* Ps. Mot. at 2-3. They simply aver that AMICA did not produce the documents

"despite related proper discovery requests." *Id.* at 2; Ps. br. at 2. Absent proof of a specific request and the withholding of responsive discovery, however, plaintiffs are not entitled to relief. *See Chrysler Corp. v. Superior Dodge, Inc.*, 83 F.R.D. 179, 195-96 (D. Md. 1979). The court holds that they have failed to meet their burden of showing that AMICA engaged in misconduct regarding evidence of consumer satisfaction.[3]

Additionally, although to obtain Rule 60(b)(3) relief the Janiks need not prove that the outcome of the trial would have been different absent the defendants' alleged misconduct, they must show that the misconduct prevented them from fully and fairly presenting their case. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1973). The Janiks have not met this burden. They concede that they "could have provided impeachment evidence at trial, regarding customer complains against AMICA." Ps. Mot. at 3 n.4. They appear to argue that they did not want "to use their precious Court-meted-out trial minutes" for this purpose. *Id.* They have failed reasonably to argue that the alleged withholding of such information prevented them from a full and fair presentation of their case

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because they not only maintain that they had impeachment evidence at trial, but also concede that they opted not to use it.

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The Janiks contend that defendants failed to produce documents relating to their demands for a "100% germ-free" cleaning. They have not shown that they requested documents relating to their germ-free demands.[4] More important, they have not established that any such documents even exist. They have failed to establish that defendants engaged in misconduct.[5]

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Plaintiffs have not demonstrated that any documents existed regarding generally acceptable claims handling practices or AMICA's policy of giving "the benefit of the doubt to the insured." Without a showing that these documents exist, the Janiks cannot demonstrate that defendants improperly withheld them. Such standards can be followed in an industry without generating documents that are within the possession, custody, or control of a party.

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[4] Plaintiffs advert to "Rule 26." *See* Ps. Mot. at 7; Ps. Br. at 3. Yet, as the court explains *supra* at note 3, they do not cite where in their complaint they alleged with particularity a disputed fact that would have required such production.

[5] If the Janiks' point is that no such documents in fact existed, then that was a matter for trial impeachment, not for a post judgment Rule 60(b)(3) motion.

Finally, the Janiks contend that defendants' expert's testimony strayed from his report. This cannot possibly serve as a basis for relief under rule 60(b)(3), especially since they had the opportunity to, and did, raise this assertion by trial objection. If the expert testified improperly, the court erred reversibly in overruling the objection, and plaintiffs properly preserved error, the appellate court can correct the error on appeal.

* * *

Plaintiffs' motion for relief under Rule 60(b)(3) is denied.[6]

SO ORDERED.

October 28, 1999.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

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[6] Plaintiffs' request for oral argument is denied. *See* N.D. Tex. Civ. R. 7.1(g).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., et al.,	§	Civil Action No. 3:95-CV-2594-D
Plaintiffs,	§	(Entered Nov. 16, 1999)
VS.	§	
CITY OF DALLAS, et al.,	§	
Defendants.	§	

ORDER

(Filed Nov. 19, 1998)

(Doc #419, entered Nov. 19, 1998)

Plaintiffs' November 18, 1998 Fed. R. Civ. P. 60(b) motion is denied. At a minimum, plaintiffs have failed to show that had the re-cap notes been disclosed, this would have had any effect on the jury's findings on plaintiffs' damages claims. Without any damages that are connected to a violation of law, plaintiffs are not entitled to a judgment against defendants. In the court's discretion, it denies the motion.

SO ORDERED.

November 19, 1998

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., et al.,	§	Civil Action No. 3:95-CV-2594-D
Plaintiffs,	§	
VS.	§	
AMICA MUTUAL INSURANCE COMPANY, et al.,	§	
Defendants.	§	

COURT'S CHARGE TO THE JURY & VERDICT

(Filed Aug. 27, 1998)

MEMBERS OF THE JURY:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

* * *

TEXAS INSURANCE CODE CLAIMS

Plaintiffs allege that defendants violated the Texas Insurance code. To establish this claim, plaintiffs must prove each of the following essential elements of the claim by a preponderance of the evidence.

> *First*, that the defendant in question engaged in an unfair or deceptive act or practice; *and*

Second, that the unfair or deceptive act or practice was a producing cause of plaintiffs' damages.

Each of the practices described below, if committed, is an unfair or deceptive act or practice.

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages complained of, if any. There may be more than one producing cause.

QUESTION NO. 10:

Did plaintiffs prove each of the essential elements of their Texas Insurance Code claim against the defendant in question and with respect to the practice in question?

Instruction: Plaintiffs have the burden of proof. If they have met their burden answer "Yes;" otherwise, answer "No." Answer separately below as to each defendant and each alleged practice.

ANSWER:

* * *

(17) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under the policy;

AMICA	YES
IAS	YES

* * *

Apportionment

QUESTION NO. 13:

What percentage of the responsibility for causing plaintiffs' damages do you find to be attributable to each party listed below?

Instruction: You should only assign percentages to the parties you find caused the damages. The percentages you find must total 100%. The percentages must be expressed in whole numbers. The responsibility attributable to any one named below is not necessarily measured by the number of acts or omissions found.

ANSWER:

AMICA	25	%
IAS	75	%
Plaintiffs	0	%
	TOTAL	100%

DAMAGES

If plaintiffs have proved one or more of their claims, then they are entitled to recover damages, if any. You should not interpret the fact that I am giving you instructions about damages as an indication in any way that I believe that the plaintiffs should, or should not, prevail in this case. I am instructing you on damages only so that you will have guidance in the event you decide that plaintiffs have proved one or more claims for which they are entitled to recover damages.

If you find that plaintiffs have proved such a claim, then you must determine an amount that is fair compensation for these damages. These damages are called compensatory damages, and their purpose is to make the plaintiffs whole – that is, to compensate them for their damages, personal property. However, if defendants establish this defense, these amounts do not affect other types of damages, if any, that plaintiffs prove.

QUESTION NO. 14:

What sum of money, if any, if paid now in cash, do you find would fairly and reasonably compensate plaintiffs for their damages, if any?

> *Instruction*: Plaintiffs have the burden of proof, except that defendants have the burden of proving the damages if any, that plaintiffs could have mitigated. Answer in dollars and cents, if any, as to each element. Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies your answers at the time of judgment. Do not include interest on any amount of damages you find.

ANSWER:

The out of pocket costs to plaintiffs to replace their sewage-contaminated property, as to those items that cannot be repaired at a cost less than the cost of replacement.

0

The out of pocket costs to plaintiffs to clean plaintiffs' consumer goods, other than those requiring special remediation efforts, as to those items that can be cleaned at a cost less than the cost of replacement.

$2815.73

The foregoing is the unanimous verdict of the jury.

Dated: 27 Aug. 1998

Hollie C. Cash
Presiding Juror

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11385

ERNEST A JANIK, JR, individually on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik

Plaintiff - Appellants

v.

CITY OF DALLAS TEXAS, Etc; ET AL

Defendants

AMICA MUTUAL INSURANCE COMPANY, a Rhode Island Company; NOBEL SERVICE CORPORATION, a Delaware Corporation doing business as Insurance Adjustment Services Inc

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

(Filed Feb. 22, 2001)

Before REYNALDO G. GARZA, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR, et al.,	§	
Plaintiffs,	§	Civil Action No.
VS.	§	3:95-CV-2594-D
AMICA MUTUAL INSURANCE COMPANY, et al.,	§	ENTERED ON DOCKET 8/31 PURSUANT TO F.R.C.P. RULES 58 AND 79a
Defendants.	§	

JUDGMENT

(Filed Aug. 27, 1998)

(Doc #394, entered Aug. 28, 1998)

The court entered partial summary judgment in favor of defendants AMICA Mutual Insurance Company ("AMICA"), IAS Claims Services, Inc. ("IAS"), and Nobel Service Corporation ("Nobel") in several memorandum opinions and orders filed in this case. Thereafter, the parties tried the remaining claims to a jury. The court granted judgment as a matter of law as to one claim against defendants IAS and Nobel. The jury returned a verdict in favor of defendants. Accordingly, it is ordered and adjudged that plaintiffs' actions against defendants AMICA, IAS, and Nobel are dismissed with prejudice.

Taxable costs of court, as calculated by the clerk of court, are assessed against plaintiffs.

Done at Dallas, Texas this 27th day of August, 1998.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT
JUDGE

APPENDIX B

U.S. CONSTITUTION AMENDMENTS

5th Amendment (Due Process Clause)

. . . nor shall any person . . . be . . . deprived of life, liberty, or property, without due process of law. . . .

7th Amendment (Trial by Jury Clause)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) *Initial Disclosures.* Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be labile to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made

by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefore, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the

Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) *Form of Disclosures: Filing.* Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes: physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discovery facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall

describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include

information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party leans that in some material respect, the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop

a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) What changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address.

The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sing the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
>
> (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
>
> (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request,

response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

[Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993.]

* * *

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to

the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987.]

* * *

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other

misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28. U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; March 2, 1987, effective August 1, 1987.]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ERNEST A. JANIK, JR., individually; and wife, LEAH EILEEN JANIK, individually; and ERNEST A. JANIK, JR., and wife LEAH EILEEN JANIK, as the Parents and Next Friends of their Minor Children, GRANT JOSEPH JANIK and TYLER NEWMAN JANIK;	FILED DEC 14 1999
plaintiffs,	CIVIL ACTION
v.	**No. 3:95-CV-2594-D**
AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IRS CLAIM SERVICES, INC.,	(Doc #449)
defendants[1]	

PLAINTIFFS' NOTICE OF APPEAL

NOTICE is hereby given that all of the plaintiffs[2] hereby appeal to the United States Court of Appeal for

---

[1] Plaintiffs' suit against the City of Dallas, by virtue of the final Judgment entered 5-28-1998, was severed from the plaintiffs' ongoing lawsuit against the other three defendants (who are AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC.).

[2] FRAP Form 1, in conjunction with FRAP Rule 3(c), indicates that it is permissible to identify appellants as "all plaintiffs".

the Fifth Circuit the "Memorandum Opinion and Order" entered in this action on October 29, 1999, and the related one-sentence "order" entered in this action on November 16, 1999, – since by those rulings the trial court:

(a) denied plaintiffs' Post-Transcript Rule 60(b)(3) Motion for Relief from 8-31-1998 Judgment, Due to Misconduct, etc., by AMICA and IAS/NOBEL[3]; and

(b) denied plaintiffs' Motion to Reconsider their Post-Transcript Rule 60(b)(3) Motion for Relief from 8-31-1998 Judgment[4];

Respectfully submitted by:

/s/ James J. S. Johnson
James J. Scofield Johnson, Esq.
Texas Bar No. 10741520
COUNSEL FOR ALL OF THE PLAINTIFFS
Plaza of the Americas,
South Tower
600 N. Pearl Street, Suite #860
Dallas, Texas 75201
817/430-9305 phone;
817/430-9306 FAX

---

[3] Plaintiffs' Post-Transcript Rule 60(b)(3) Motion for Relief was filed August 30, 1999 (with Brief, etc.).

[4] Plaintiffs' Motion to Reconsider their Post-Transcript Rule 60(b)(3) Motion was filed November 15, 1999 (with Brief, etc.); – the Order denying said motion was signed on the same afternoon it was filed (and entered the next day).

CERTIFICATE REGARDING SERVICE

THIS IS TO CERTIFY THAT copy of the foregoing, with attachments (if any), will have been served on December 14, A.D. 1999, on the below-noted addressees, via FAX, courier, CMRRR, and/or first class U.S. mail, pursuant to the Federal Rules of Appellate Procedure, –

R. Brent Cooper, Esq.
R. Douglas Rees, Esq.
Cooper, Aldous & Scully, P.C.
Founders Square, Suite #100
900 Jackson, Dallas, TX 75202

(counsel for IAS/NOBEL defendants)
if by FAX: 214/712-9540

Marc H. Fanning, Esq.
Timothy King Fifer, Esq.
Cathlynn H. Cannon, Esq.
Fanning, Harper & Martinson
3rd Floor, Preston Commons West
8117 Preston Road, Dallas, TX 75225

(counsel for AMICA)
if by FAX: 214/987-9649

/s/ James J. S. Johnson
James J. S. Johnson, Esq.
(CERTIFYING ATTORNEY

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., individually, and wife, et al.	*	**CIVIL ACTION NO. 395-CV-2594-D**
Plaintiffs,	*	**(Filed Nov. 15, 1999)**
v.	*	**(Doc #447)**
AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC.,	*	
Defendants.	*	

JANIK'S SUPPLEMENTAL DECLARATION
verifying discovery abuses, unfair surprises, and other misconduct of defendants, in support of
PLAINTIFFS' MOTION TO RECONSIDER
THEIR POST-TRANSCRIPT RULE 60(b) (3) MOTION FOR RELIEF FROM 8-31-1998 JUDGMENT

TO THE HONORABLE SIDNEY A. FITZWATER, U.S. DISTRICT JUDGE OF PRESIDING OVER SAID COURT:

Plaintiffs hereby submit the attached Supplemental Declaration (as a supplement to the re-submission and re-authorization of the documentation within of Mr. Janik's 11-18-1998-filed declaration), with the attached Supplemental Declaration being declared by one of the plaintiffs in support of the plaintiffs' MOTION TO RECONSIDER THEIR RULE 60(b) (3) POST-TRANSCRIPT MOTION FOR RELIEF

FROM JUDGMENT, which motion for reconsideration is largely based upon issues raised in this honorable Court's MEMORANDUM OPINION AND ORDER signed 10-28-1999 and entered on 10-29-1999 (and, regarding which 10-38/28-1999 ruling, the Janiks now seek reconsideration).

Respectfully submitted by:

/s/ James J. S. Johnson
James J. S. Johnson, Esq.
Texas Bar No. 10741520
Plaza of the Americas, South
Tower #860
600 N. Pearl Street, Dallas, TX 75201
metro 817/430-9305 new telephone;
metro 817/430-930-9306 new FAX
COUNSEL FOR THE PLAINTIFFS/MOVANTS

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., individually, and wife, Leah Eileen Janik, individually; and ERNEST A. JANIK, JR. & wife Leah Eileen Janik, as parents and next friends of their minor children, GRANT JOSEPH JANIK and TYLER NORMAN JANIK; *Plaintiffs,* v. AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC., *Defendants.*	**CIVIL ACTION NO. 395-CV-2594-D** **ORAL ARGUMENT REQUESTED**

JANIK'S 11-14-1999 SUPPLEMENT TO HIS 11-18-1998 DECLARATION, IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER RULE 60(B) (3) RELIEF

"I, ERNEST A. JANIK, JR., as one of the plaintiffs in the above-noted litigation. I hereby declare and state the following facts upon my personal knowledge, and my declaration stated hereinbelow is true and correct, and I hereby make this declaration pursuant to 28 U.S.C. § 1746, under penalty of perjury:

A.

A true and correct copy of my file-marked copy of my Declaration filed 11-18-1998 is to be re-submitted for review (with a separate authentication declaration, via filing on 11-15-1999, i.e., to be filed contemporaneously herewith), i.e., for reconsideration by the above-noted Court as support for plaintiffs' Rule 60(B) (3) Motion filed on 8-30-1999 (which plaintiffs now seek reconsideration of).

B.

Accordingly, I hereby provide supplemental documentation and/or attention to various documents showing the basis of plaintiffs' Rule 60(b) (3) Motion, as well as verified statements regarding how the plaintiffs' ability to fully and fairly present their case at trial was hindered by various discovery abuses, unfair surprises, and other misconduct by AMICA and the IAS/NOBEL defendants.

C.

The attached documents are authenticated copies and the following statements made regarding such documents are hereby verified by me as being true and correct and according to my personal knowledge (which is based upon my personal review of the respective pleadings and discovery-related papers identified by me hereinafter).

D.

As the attached documentation indicates (in conjunction with the verified documentation within my 11-18-1998-

filed Declaration, which is incorporated by reference herein), the plaintiffs in this case (my family) have been unfairly prejudiced in this litigation by combined effect of many *discovery abuses, unfair surprises, and other misconduct* of AMICA and the IAS/NOBEL defendants, such that our ability, as plaintiffs, to fully and fairly present their case at trial was hindered in a manner that prejudiced plaintiffs' trial preparations and trial approach, as is more fully shown by the attachments indexed and attached herein (all of which attached papers are genuine copies of my original copies thereof).

E.

To assist the court, the documentation specifically provided by this Supplemental Declaration is organized, topically, as shown by the following alphabetically-indexed outline:

INDEX OF TOPICALLY TABBED CONTENTS

Janik's 11-14-1999 SUPPLEMENTAL DECLARATION's Introduction & Overview, w/ summaries & index-cites to misconduct's trial preparation impact (*i.e., influence on plaintiffs*), as per the "sabotage" of "federal trial machinery" issues raised in *Rozier v. Ford Motor Co.*, 573 F.2d 1322, 1341-1346 (5th Cir. 1978) (re Rule 60(b) (3)'s policy)

A. "ACTIVELY CONCEAL"/"ACTIVELY WITHHOLD" – CHRONOLOGY OF RE-CAP

A-1: 12-6-1996 RULE 34 REQUEST TO IAS/NOBEL FOR RE-CAP NOTES;

A-2: 1-6-1997 ORIGINAL DEADLINE FOR ALL RULE 26(a) (2) REPORTS;

A-3: 1-24-1997 IAS/NOBEL ATT'Y CLAIMS RE-CAP PRIVILEGED;

A-4: 3-10-1997 AMICA OPPOSES SUBPOENAED EXPERT DOCS w/ RECAP;

A-5: 3-13-1997 IAS OPPOSES SUBPOENAED EXPERT DOCS w/ RECAP;

A-6: 8-25-1997 IAS SAYS "MOST" EXPERT DOCS ALREADY PRODUCED;

A-7: 8-27-1997 AMICA SAYS EXPERTS HAVE NO UNPRODUCED DOCS;

A-8: week of 9-2-1997: *JANIKS FOR FIRST TIME SEE RE-CAP – BY VIRTUE OF USING RULE 45 SUBPOENAS TO SEE AND COPY FILES OF TRIAL EXPERTS QUINN, SHUMAKER, & SANDERS!*

B. ***[not used]***

C. CUSTOMER SATISFACTION (*"GIVE BENEFIT OF DOUBT"*)

C-1: COMPLAINT PAGES SHOWING DISPUTED TOPIC;

C-2: PAGES OF TESTIMONY SURPRISES NOT PRODUCED BY DISCLOSURE;

C-3: PAGES OF PAPER DISCOVERY REQUESTING INFO ON THAT TOPIC, - WITH NON-RESPONSIVE/EVASIVE ANSWERS ON THAT TOPIC;

C-4: PAGES OF UNFAIR JURY ARGUMENT ON THAT TOPIC

D. DECEPTIVE DOCUMENTATION OF CLAIMS HANDLING

(e.g., suggesting Janiks demanded "100% germ-free")

D-1: COMPLAINT PAGES SHOWING DISPUTED TOPIC;

D-2: PAGES OF TESTIMONY SURPRISES NOT PRODUCED BY DISCLOSURE;

D-3: PAGES OF PAPER DISCOVERY REQUESTING INFO ON THAT TOPIC, – WITH NON-RESPONSIVE/EVASIVE ANSWERS ON THAT TOPIC;

D-4: PAGES OF UNFAIR JURY ARGUMENT ON THAT TOPIC

E-F [*not used*]

G **"GENERALLY ACCEPTED CLAIMS HANDLING PRACTICES"**

G-1: COMPLAINT PAGES SHOWING DISPUTED TOPIC;

G-2: PAGES OF TESTIMONY SURPRISES NOT PRODUCED BY DISCLOSURE;

G-3: PAGES OF PAPER DISCOVERY REQUESTING INFO ON THAT TOPIC, – WITH NON-RESPONSIVE/EVASIVE ANSWERS ON THAT TOPIC;

G-4: PAGES OF UNFAIR JURY ARGUMENT ON THAT TOPIC

H [*not used*]

I **"IAS":** ***"WHO IS/WAS 'IAS'?"***

I-1: COMPLAINT PAGES SHOWING DISPUTED TOPIC;

I-2: PAGES OF TESTIMONY SURPRISES NOT PRODUCED BY DISCLOSURE;

I-3: PAGES OF PAPER DISCOVERY REQUESTING INFO ON THAT TOPIC, – WITH NON-RESPONSIVE/EVASIVE ANSWERS ON THAT TOPIC;

I-4: PAGES OF UNFAIR JURY ARGUMENT ON THAT TOPIC

J-K [*not used*]

L **LIVE PLEADINGS** (parts of **Janik's 3RD AMENDED COMPLAINT**), relevant for recognizing required Rule 26(a) (1) productions

M [*not used*]

N [*not used*]

O [*not used*]

P-A **PROPOUNDED DISCOVERY TO AMICA, – WITH EVASIVE RESPONSES** (examples of obstructionist discovery tactics by AMICA; claiming privilege to resist producing re-cap notes, etc., on dates after re-cap notes used by AMICA's trial experts)

P-I **PROPOUNDED DISCOVERY TO IAS/NOBEL, – with EVASIVE RESPONSES** (examples of obstructionist discovery tactics by IAS/NOBEL; claiming privilege to resist producing re-cap notes, etc., on dates after re-cap notes used by IAS/NOBEL's trial experts)

Q **QUINN'S EXPERT REPORT**

R **REPUTATION DECEPTION ("#1 CONSUMER RATINGS")**

- R-1: COMPLAINT PAGES SHOWING DISPUTED TOPIC;
- R-2: PAGES OF TESTIMONY SURPRISES NOT PRODUCED BY DISCLOSURE;
- R-3: PAGES OF PAPER DISCOVERY REQUESTING INFO ON THAT TOPIC, – WITH NON-RESPONSIVE/EVASIVE ANSWERS ON THAT TOPIC;
- R-4: PAGES OF UNFAIR JURY ARGUMENT ON THAT TOPIC

S
- S-1: **SANDERS'** EXPERT REPORT
- S-2: **SHUMAKER'S** EXPERT REPORT
- S-3: **SEIDENFELD'S** EXPERT REPORT

T-W [*not used*]

X **CROSS-REFERENCES TO JANIK'S 11-18-1998 DECLARATION**

Y-Z [*not used*]

F.

Plaintiffs would have prepared differently for trial, and would have modified our trial approach (as well as our

approach to the multiple waves of summary judgment motions in this case, by which our DTPA claims were struck etc.), – if plaintiffs would have had the benefit of various document productions that were *not* timely provided (such as AMICA and IAS/NOBEL documents requested via informal and formal document production requests) or which, to date, have *never* been provided. For example, prejudicial delays in receiving discovery mandated documents harmed plaintiffs' ability to provide such documents to plaintiffs' experts (timely), so that plaintiffs' experts could fairly utilize those documents in pre-trial and trial activities. Also, prejudicial delays (and/or ongoing denials/withholdings/concealments) regarding discovery-mandated documents have harmed plaintiffs' ability to prepare for trial including preparation of cross examination approaches and including budgeting court-limited trial minutes.

G.

Moreover, I stand ready, willing, and able to testify in an evidentiary hearing, if one would be granted (in conjunction with an occasion for oral argument), to verify before this Court that (and how) the plaintiffs were prevented from fully and fairly presenting their case in this litigation, due to the discovery abuses (which discovery abuses include obstructionist tactics that unreasonably increased my litigation costs in this case), unfair surprises, and other misconduct of AMICA and the IAS/NOBEL parties.

Signed & verified this 14th day of November, A.D. 1999.

/s/ Ernest A. Janik Jr.
ERNEST A. JANIK, JR.,
one of the plaintiffs/movants

*See the following pages for specific descriptions and impacts that illustrate how defendant's misconduct harmed Plaintiffs' trial preparations and trial approaches.

AMICA'S "CONSUMER RATINGS"

1. See my 11-18-1998 Declaration and its underlying support, including specific examples and contrary evidence that would have been used by plaintiffs at trial:
   a) page 5, ¶ 1(m)
   b) page 7, ¶ 2a
   c) page 10, ¶ 3i
   d) Tab K (all pages)
   e) Tab J (all pages)
   f) Tab P, page P-1, ¶ 5
   g) Tab R, page R-1, ¶ 4
   h) Tab T, page T-1, ¶¶ 3 & 9

2. Plaintiffs and plaintiffs' experts would have provided contrary testimony and exhibits regarding plaintiffs' exhibits PX 431, PX 432, PX 433 – which involve over 1,200 pages of actual complaints filed against AMICA, with the TEXAS DEPARTMENT OF INSURANCE, including plaintiffs' exhibit PX 719, which is a summary of these consumer complaints. PX 719 also identifies those claims involving the same persons who were involved in the Janik matter: Mr. Tom Ferris (of AMICA); Mr. Myles Walsh (of AMICA); Mr. David Terry (of IAS); Mr. Jene Montague (of IAS); among others.

3. Had this (i.e., AMICA's supposed #1 "consumer rating") been disclosed prior to trial, plaintiffs would have researched the criteria used, compared such criteria to defendants' behavior with the Janiks, and provided the related testimony – including independent & objective opinions from plaintiffs' trial experts (Mr. Tom Veitch and Mr. Bob Lazarus).

4. Additionally, plaintiffs would have used the above information in plaintiffs' responses opposing the defendants' various motions for summary judgment, and plaintiffs would have used the above information in declarations filed in support of plaintiffs' responses (opposing the defendants' various motions for summary judgment), – including those summary judgment motions that involved plaintiffs' DTPA claims and economic coercion claims.

5. This trial surprise (i.e, about AMICA supposedly having #1 "consumer ratings" every year) does not appear to be disclosed anywhere within the following documents:

   a) AMICA's Rule 26 disclosure;
   b) IAS/NOBEL's Rule 26 disclosure;
   c) AMICA's claim file (trial exhibit A-1, including pages numbered between Bates #A000003 to #A001649, which file contained pages that did not contain or match all of those Bates range numbers);
   d) IAS/NOBEL's claim file (trial exhibit DX 1), including pages numbered between Bates #I00002 to #I00950, which file contained pages that did not contain or match all of those Bates range numbers);
   e) defendants' trial exhibits.

AMICA'S "BENEFIT OF THE DOUBT" PRACTICE

1. See my 11-18-1998 DECLARATION and its underlying support, including specific examples and contrary evidence that would have been used by plaintiffs at trial:
   a) page 3, ¶ 1(a)
   b) page 7, ¶¶ 2b & 2f
   c) page 8, ¶¶ 2f & 3a
   d) page 9, ¶ 3g
   e) page 12, ¶2q
   f) Tab F, ¶ F4
   g) Tab J, all pages
   h) Tab K, all pages
   i) Tab P, ¶ 2
   j) Tab Q, ¶ 2
   k) Tab R, ¶¶ 7 & 8
   l) Tab T, ¶¶ 2, 7, 8, 13, 14, 12, & 8
   m) Tab U, ¶ 3
   n) Tab W, ¶¶ W8 to W11
2. Plaintiffs and plaintiffs' experts would have provided numerous examples of contrary evidence including AMICA's failure to pay the policy limit on additional living expenses ("ALE"), despite the insured's documentation of expenses that exceeded the policy limit (for ALE).
3. This trial surprise (i.e, about AMICA supposedly having a practice of giving their insureds the "benefit of the doubt") does not appear to be disclosed anywhere within the following documents:
   a) AMICA's Rule 26 disclosure;
   b) IAS/NOBEL's Rule 26 disclosure;
   c) AMICA's claim file (trial exhibit A-1, including pages numbered between Bates #A000003 to #A001649, which file contained pages that did not

contain or match all of those Bates range numbers);

d) IAS/NOBEL's claim file (trial exhibit DX 1), including pages numbered between Bates #I00002 to #I00950, which file contained pages that did not contain or match all of those Bates range numbers);

e) defendants' trial exhibits.

AMICA'S & IAS/NOBEL'S "100% GERM-FREE" ACCUSATION

1. SEE MY 11-18-1998 DECLARATION and its underlying support, including specific examples and contrary evidence that would have been used by plaintiffs at trial:
   a) page 5, ¶ 1(1)
   b) page 7, ¶ 2c
   c) page 9, ¶ 3e
   d) Tab G, all pages
   e) Tab N, ¶¶ N7, N3, & N4
   f) Tab O, (regarding IAS/NOBEL), ¶¶ O13 & O14
   g) Tab P, ¶ 1
   h) Tab Q, ¶ 3
   i) Tab R, ¶ 6
   j) Tab T, ¶¶ 5 & 6
2. Plaintiffs would have testified that subpoenaed Blackmon Mooring records PX 435, PX 436, and PX 437 contained no evidence supporting this surprise (i.e., AMICA's and IAS/NOBEL's "100% germ-free" accusation).

3. Plaintiffs would have, on direct examination, provided contrary evidence with plaintiffs' witness Greg Upah, who was qualified to testify as an expert witness and a fact witness.
4. Plaintiffs and plaintiffs' insurance experts (Mr. Tom Veitch and Mr. Bob Lazarus) could have testified about contrary evidence to this surprise (i.e., AMICA's and IAS/NOBEL's "100% germ-free" accusation).
5. This trial surprise (i.e, AMICA'S and IAS/NOBEL'S "100% germ-free" accusation) does not appear to be disclosed anywhere within the following documents:

   a) AMICA's Rule 26 disclosure;
   b) IAS/NOBEL's Rule 26 disclosure;
   c) AMICA's claim file (trial exhibit A-1, including pages numbered between Bates #A000003 to #A001649, which file contained pages that did not contain or match all of those Bates range numbers);
   d) IAS/NOBEL's claim file (trial exhibit DX 1), including pages numbered between Bates #I00002 to #I00950, which file contained pages that did not contain or match all of those Bates range numbers);
   e) defendants' trial exhibits.

DR. SEIDENFELD'S MEDICAL TESTIMONY AT TRIAL

1. See my 11-18-1998 DECLARATION and its underlying support, including specific examples and contrary evidence that would have been used by plaintiffs at trial:

a) page 3, ¶ 1(b)
b) page 11, ¶ 3n
c) Tab S, all pages
d) Tab D, all pages
e) Tab I, all pages

2. Had this (i.e., Dr. Seidenfeld's expanding his Rule 26 expert report's "no infectious diseases" opinion into a "no sickness at all" opinion) been disclosed prior to trial testimony, plaintiffs would have used a trial approach involving some combination of the following: obtained contrary trial testimony from the Janik family's doctors, from plaintiffs' medical expert (Dr. David Brandon), and from the plaintiffs.
3. Plaintiffs' medical expert (Dr. David Brandon) would have been asked preemptive questions, on direct about sicknesses that do not involve "infectious disease" (i.e., "no infections" "not sick at all").
4. This trial surprise (i.e., i.e., Dr. Seidenfeld's expanding his Rule 26 expert report's "no infectious diseases" opinion into a "no sickness at all" opinion) does not appear to be disclosed anywhere within the following documents:
   a) AMICA's Rule 26 disclosure;
   b) IAS/NOBEL's Rule 26 disclosure;
   c) Dr. Seidenfeld's Rule 26 expert report;
   d) defendant's trial exhibits.

GENERALLY ACCEPTED CLAIMS HANDLING POLICIES & PROCEDURES"

1. See my 11-18-1998 DECLARATION and its underlying support, including specific examples and contrary evidence that would have been used by plaintiffs at trial:
   a) page 6, ¶¶ 1(p) & 1(q)
   b) page 7, ¶¶ 2b & 2e
   c) page 8, ¶ 2g
   d) page 9, ¶ 3d
   e) page 4, ¶ 1(i)
   f) page 10, ¶ 3j
   g) page 11, ¶¶ 31 & 3m
   h) page 13, ¶¶ 4a & 4b
   i) page 14, ¶ 4d
   j) Tab M, pages M1 & M2, ¶¶ 1, 2, 3, 4, 5 & 8
   k) Tab N, page N1, ¶¶ N11, N12, N13, N14, & N6
   l) Tab O, (regarding IAS), page 01, ¶¶ 08 & 04
   m) Tab P, pages P1 & P2, ¶¶ 3, 6 & 4
   n) Tab Q, pages Q1 & Q2, ¶¶ 5 & 1
   o) Tab R, page R1, ¶¶ 4, 17, & 18
2. Had this (i.e., that AMICA's and IAS/NOBEL's witnesses would provide trial opinion purportedly based on "generally accepted claims handling practices", *which supposed standard was never produced in written form prior to or at trial*), plaintiffs and plaintiffs' experts would have reviewed defendants' claims handling policies and procedures in order to evaluate

defendants' compliance regarding defendants' behavior and regarding the actions taken with respect to the Janiks, etc.

3. Plaintiffs' experts could have provided expert opinion testimony as to whether AMICA's policies and procedures, and/or as to whether IAS/NOBEL's policies and procedures, were in fact "generally accepted" standards for claims handling practices.
4. This trial surprise (i.e, that AMICA's and IAS/NOBEL's witnesses would provide trial opinion purportedly based on "generally accepted claims handling practices") does not appear to be disclosed anywhere in the following documents:
   a) AMICA's Rule 26 disclosure;
   b) IAS/NOBEL's Rule 26 disclosure;
   c) AMICA's claim file (trial exhibit A-1, including pages numbered between Bates #A000003 to #A001649, which file contained pages that did not contain or match all of those Bates range numbers);
   d) IAS/NOBEL's claim file (trial exhibit DX 1), including pages numbered between Bates #I00002 to #I00950, which file contained pages that did not contain or match all of those Bates range numbers);
   e) defendants' trial exhibits.
5. Had the defendants' claims handling policies and procedures been timely disclosed and produced (as alleged at trial as being "generally accepted"), plaintiffs and plaintiffs' experts would have provided declarations in opposition, – and/or plaintiffs' experts would have timely provided Rule 26 expert report conclusions, than more than likely (if not most likely)

would have supported plaintiffs' claims against the defendants, including plaintiffs' claims for DTPA, economic coercion, undue influence, among others.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., individually; and wife, et al. Plaintiffs, v. AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLASS SERVICES, INC., Defendants.	*	CIVIL ACTION No. 395-CV-2594-D (Filed Nov. 15, 1999) (Doc #446)

JANIK's AUTHENTICATION DECLARATION
authenticating a pre-transcript declaration, in support of PLAINTIFFS' MOTION TO RECONSIDER THEIR POST-TRANSCRIPT RULE 60(b)(3) MOTION FOR RELIEF FROM 8-31-1998 JUDGMENT

TO THE HONORABLE SIDNEY A. FITZWATER, U.S. DISTRICT JUDGE OF PRESIDING OVER SAID COURT:

Plaintiffs hereby submit the attached authentication Declaration (*regarding the authentication of a 11-18-1998-filed declaration*), as declared by one of the plaintiffs in support of the plaintiffs' MOTION TO RECONSIDER THEIR RULE 60(b)(3) POST-TRANSCRIPT MOTION FOR RELIEF FROM JUDGMENT, which motion for reconsideration is largely based upon issues raised in this honorable Court's MEMORANDUM OPINION AND ORDER signed 10-28-1999 and entered on

10-29-1999 (*and, regarding which 10-28/29-1999 ruling, the Janiks now seek reconsideration*).

Respectfully submitted by:

/s/ James J. S. Johnson
James J. S. Johnson, Esq.
Texas Bar No. 10741520
Plaza of the Americas,
South Tower #860
600 N. Pearl Street, Dallas,
TX 75201
metro 817/430-9305
new telephone;
metro 817/430-9306 new FAX
COUNSEL FOR THE
PLAINTIFFS/MOVANTS

JANIK's DECLARATION authenticating 11-18-1998 DECLARATION

"I, ERNEST A. JANIK, JR., am one of the plaintiffs in the above-noted litigation. I hereby declare and state the following facts upon my personal knowledge, and my declaration stated hereinbelow is true and correct, and I hereby make this declaration pursuant to 28 U.S.C. § 1746, under penalty of perjury:

A.

Attached hereto, for reconsideration by the above-noted Court, is a copy of my file-marked copy of my Declaration filed 11-18-1998.

B.

It is my understanding that my 11-18-1998-filed Declaration was likely not accessible (*or was not readily accessible*) to this Court during October 1999 – due to the Court's file being in the custody of the Fifth Circuit Court of Appeal. However, during October 1999 plaintiffs filed a Rule 60(b)(3) Motion that referred to (and relied in part upon) my 11-18-1998-filed Declaration.

C.

Since it appears likely that my 11-18-1998-filed Declaration was originally considered by Rule 60(b)(2) standards[1] – as opposed to Rule 60(b)(#) standards – so we plaintiffs are now re-submitting a copy of my 11-18-1998-filed Declaration, *so that this Court may reconsider the meritorious documentation verified and authenticated within my 11-18-1998 Declaration,* for Rule 60(b)(3) purposes.

D.

Accordingly, I hereby authenticate the attached indexed photocopy of my 11-18-1998 as a true and correct copy of my file-marked copy of my 11-18-1998-filed Declaration."

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[1] This legal conclusion has been asserted by plaintiffs' counsel (*on whom I have relied for this inference*) via "PLAINTIFFS' BRIEF SUPPORTING THEIR POST-TRANSCRIPT RULE 60(B)(3) MOTION FOR RELIEF FROM THE 8-31-1998-ENTERED JUDGMENT, DUE TO MISCONDUCT OF AMICA AND THE IAS/NOBEL DEFENDANTS" (filed August 30, 1999), page 6, ¶ 11, which ¶11 specifically quotes from this honorable Court's ORDER signed & entered on 11-19-1998.

Signed & verified this 14th day of November, A.D. 1999.

/s/ Ernest A. Janik, Jr.
ERNEST A. JANIK, JR.,
one of the plaintiffs/movants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ERNEST A. JANIK, JR., individually, and wife, LEAH EILEEN JANIK, individually, and ERNEST A. JANIK, JR., and wife LEAH EILEEN JANIK, as parents and next friends of their minor children, GRANT JOSEPH JANIK and TYLER NORMAN JANIK; plaintiffs,	*	CIVIL ACTION No. 395-CV-2594-D
v.	*	(FILED 11/18/1998)
AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC., defendants.	*	(Doc #418)

JANIK DECLARATION
supporting Rule 60(b) Motion
for relief from judgment,
due to unfair surprises, etc.
caused by
AMICA MUTUAL INSURANCE COMPANY
and/or the IAS/NOBEL defendants

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs hereby come and submit this Declaration of one of the plaintiffs in support of their Rule 60(b) Motion for Relief from Judgment, due to unfair surprises, etc. caused by AMICA MUTUAL INSURANCE COMPANY, and/or

by the IAS/NOBEL defendants, as follows by the attachment hereto.

Respectfully submitted by:

/s/ James J. S. Johnson
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COUNSEL FOR
THE PLAINTIFFS

JANIK DECLARATION
regarding
UNFAIR SURPRISES, MISREPRESENTATIONS, AND THE LIKE,
caused by AMICA MUTUAL INSURANCE COMPANY
and/or by the IAS/NOBEL defendants

I, **ERNEST A. JANIK, JR.**, am one of the plaintiffs in the above-noted litigation. I hereby declare and state the following facts based upon my personal knowledge, and my declaration stated hereinbelow is true and correct, and I hereby make this declaration pursuant to 28 U.S.C. § 1746, under penalty of perjury:

A.

INTRODUCTION

1. The trial process which my family (the plaintiffs) experienced during August 1998 was flawed by various unfair/unjust surprises, misrepresentations, and the like,

many of which were caused by **AMICA MUTUAL INSURANCE COMPANY** ("AMICA"), and/or by the IAS/NOBEL defendants ("IAS/NOBEL"), IAS CLAIM SERVICES, INC. and NOBEL SERVICE CORPORATION. Those AMICA-caused unfair surprises, misrepresentations, other types of misconduct, and the like, include (but are not necessarily limited to) the following:

a) AMICA's misleading assertions of its having paid the "policy limits", when in fact AMICA only paid approximately $4,000 of its policy's defined ALE limit of $12,000, – such that AMICA's assertions at trial regarding "policy limits" being merely $60,000 constituted misleading misrepresentation of material fact to the jury, that prejudiced the plaintiffs. For support of this point, please see, e.g., Tab C's Tr. 7B @ 48 and H2.

b) AMICA's and IAS' improper usage of **Steven Seidenfeld, M.D.**, as a designated expert witness who testified outside of his Rule 26 report, to the unfair surprise and prejudice of the plaintiffs. For support of this point, please see Tab S and Tab I.

c) AMICA's and IAS' improper usage of Kenneth Shumaker, as a designated expert witness who testified outside of his Rule 26 report, to the unfair surprise and prejudice of the plaintiffs. For support of this point, please see Tab P.

d) AMICA's improper usage of **Michael Quinn, Esq.**, as a designated expert witness who testified outside of his Rule 26 report, to the unfair surprise and prejudice of the plaintiffs. For support of this point, please see Tab Q.

e) IAS' improper usage of **David Terry**, as a designated expert witness who testified outside of the contents of his filed affidavit and without any previously disclosed Rule 26 report, to the unfair surprise and

prejudice of the plaintiffs. For support of this point, please see Tab T.

f) AMICA's and IAS' improper usage of **opening arguments**, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see Tab B (as well as ¶ 2 through ¶ 2g hereinbelow).

g) AMICA's and IAS' improper usage of **closing arguments**, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see Tab C (as well as ¶ 3 through ¶ 3s hereinbelow).

h) AMICA's and IAS' misleading characterizations of the Janiks' **"property losses"** as amounting to some $124,000, when this deceptively **failed to identify some $42,613** of the Janiks' insurance claims as being for "loss of use" damages, as opposed to for replacement value or repair related "property loss" damages. For support of this point, please see Tab V.

i) AMICA's misrepresentations about **my willingness to meet with AMICA and with IAS/NOBEL personnel** regarding the particulars of the Janiks' insurance claim and/or AMICA's failure to pay same, especially in light of my offers to meet with AMICA/IAS personnel, and IAS/NOBEL's decision to avoid meeting with me when I met with AMICA personnel during April 1994, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and

prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see Tab F.

j) AMICA's misrepresentations about **my communications with AMICA and IAS/NOBEL personnel** regarding the particulars of the Janiks' insurance claim and/or AMICA's failure to pay same, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see Tab W and Tab F.

k) IAS' misrepresentations at trial involving **oral deposition quotes** despite the availability of my oral deposition and the corrigenda thereto, so as to mislead the jury as to the instance when I saw flooding liquids mixed with non-fecal material outside my family's residence on 10-31-1993. For support of this point, please see Tab E.

l) AMICA's and IAS' misuse of witness testimony at trial, regarding my supposed request for **"100% germ-free"** remediation of sewage-contaminated property items, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that unjstly and misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see Tab G.

m) AMICA's misuse of Tom Ferris' testimony at trial as to its mode, non-meaningfulness, and practices of advertising in conjunction with its supposedly being rated as **#1 in insurance consumer reports**, in conjunction with AMICA's Tom Ferris' trial testimony that AMICA's advertisements in Tom Ferris' annual reports (sent each year to AMICA's insureds) were

mere **"propaganda" and "baloney"**, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, in addition to page 20 and page 30 of AMICA's response to discovery requests (provided at Tab N), please see, e.g., Tab R1 @ items 1, 2, and 4.

n) AMICA's improper usage of **Tom Ferris**, as a designated fact witness who testified in ways that controverted the discovery production and discovery responses provided by AMICA, – to the unfair surprise and prejudice of the plaintiffs. For support of this point, please see Tab R.

o) AMICA's and IAS/NOBEL's misuse of testimony at trial regarding the supposed **sewage contamination loss-related experience of AMICA and/or IAS/NOBEL**, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see, e.g., Tab R1 @ #3 and Tab N1, N6, and Tab O1, O4.

p) AMICA's and IAS' misuse of testimony at trial regarding the supposed **typicality of AMICA's (and IAS') usage of a proof of loss form as a mere "payment tool" used to verify the identity of an insured as a payee of an insurance claim**, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see, e.g., Tab R1 @ item #12 and Tab T3 @ items 17 & 18.

q) AMICA's misuse of AMICA personnel testimony at trial regarding a supposed **emergency service** that supposedly existed and was operational on 10-31-1993, – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, please see, e.g., Tab R1 @ item 5.

r) AMICA's misuse of testimony at trial suggesting that I am the **"most difficult"** insured that AMICA personnel have ever dealt with in their careers during the past 30 to 35 years (*supposedly being "at odds" with "everyone"*), – in ways inconsistent with Rule 26 disclosures and/or other responses to properly propounded discovery, to the unfair surprise and prejudice of the plaintiffs, and/or in ways that misleadingly misrepresented verdict-related facts to the jury. For support of this point, see Tab T2 @ item #9 and Tab Q1 @ item #4.

s) AMICA's misuse of the discovery process, as well as the trial process, to attack me as a designated witness in other ongoing (*Santos*) litigation being handled by AMICA's counsel, – as is more fully documented by the "PLAINTIFFS' MOTION FOR RELIEF, AND BRIEF, INCLUDING OBJECTION TO QUASH EXHIBIT #IT-28, ETC." (which filing is only alluded to herein, because it was already filed of record by plaintiffs during trial on 8-23-1998, and has not yet received a formal ruling from the presiding judge). See also Tab Y and ¶ 5 hereinbelow.

B.
SPECIFIC UNFAIR SURPRISES, MISREPRESENTATIONS, MISCONDUCT, ETC.

2. Opening Argument unfair surprises, misrepresentations, etc.

The opening arguments of AMICA and of the IAS/NOBEL defendants contained verdict-related unfair surprises, misrepresentations, and misconduct capitalizations that unfairly gave trial advantages to the defendants, prejudicing the plaintiffs (and the trial process), by unduly interfering with the jury's right to hear the truth.

2a. AMICA's **consumer ratings** were discussed (without any supporting evidence) by AMICA during opening argument. This assertion of supposed fact was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 32.

2b. AMICA's and IAS/NOBEL's opening arguments asserted that **"policy limits" were paid to the Janiks,** with the AMICA policy coverage's "policy limits" being misleadingly characterized *as only the $60,000 available for unscheduled personal property*. This supposed fact was improper, in light of AMICA's discovery responses and the policy contract's own terms. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 37, 38, 39, 48.

2c. AMICA's opening arguments included the supposed assertion of the Janiks that their insured property needed to be cleaned to the extent that it was **"100% guarantee it's germ-free"**. This assertion by AMICA was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 34, 37, 38.

2d. AMICA's opening argument asserted that **AMICA decided in December 1993 to "replace"** my family's sewage-contaminated property items (*rather than insist on cleaning and re-cleaning until fully restored condition*). This supposed fact was improper and misleading, in light of AMICA's own discovery responses, especially in conjunction with IAS/NOBEL's discovery production and response. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 38.

2e. AMICA's opening argument suggesting that the purposes and proposed usage of a **"proof of loss" form** was solely **so that AMICA would know whom to pay** *for my family's insured losses.* This misrepresentation inexcusably misstates the terms of the insurance contract as it defines the terms and conditions for using such a proof of loss form. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 39, 43.

2f. AMICA's opening argument that I was **impossible to satisfy** was inexcusably misleading, since I previously settled claims amicably with AMICA and with another insurer, yet AMICA objected to my related testimony supporting this inconsistency. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1, @ 35, 36, 40.

2g. AMICA's opening argument mischaracterized **AMICA's active and controlling role** *in getting contamination testing samples, having the samples tested and analyzed, and meeting with a scientific analyst* and the adjustor to decided how to makes decisions affecting my family's insured property in light of the contamination testing data. Moreover, AMICA's opening argument mischaracterized the level of involvement that AMICA's only agent on the scene ("IAS") would operate at, since AMICA's counsel falsely suggested that "The Insurance Company . . . doesn't say don't go in there, that's dangerous. They don't tell you anything."

For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 34, 35.

3. Closing Argument unfair surprises, misrepresentations, etc.

3a. AMICA's and IAS/NOBEL's closing argument asserted that Jene Montague had told me that **AMICA and IAS approved of my family's moving our sewage-contaminated property immediately**, – as opposed to the facts of IAS/NOBEL refusing to grant us permission/approval to move our contaminated property items, since keeping the property inside the sewage-contaminated house would be "cheaper" (*i.e., "cheaper" from AMICA's and IAS/NOBEL's perspective, which perspective I was supposed to "cooperate" with*). This closing argument suggestion was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 43, 44, 49, in conjunction with Tab M's Affidavit of Jene Montague and PX #739HH (*pages KJS313 through KJS319, plus handwritten notes on page KJS311*). See also Tab M1 through M2, and M3 with Tab M support.

3b. Closing arguments by AMICA's counsel unfairly mislead the jury regarding the **relationship of (1) the handling of the property contamination testing to (2) my family's insurance coverage-related rights**. This instance of unjustified misrepresentation of verdict-related facts was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 44, 45, as well as Tab M.

3c. Closing arguments by AMICA's counsel unfairly misled the jury regarding my family's continued exposure to the **sewage-water-borne contaminants and the related sewage-aerosol-borne contaminants** *during the*

critical time-frame of November 2-8, 1993. This unjustified misrepresentation of verdict-related facts was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 45, 47.

3d. AMICA's closing argument suggested that **AMICA was not responsible for having contamination testing done** on property items covered by AMICA insurance, prior to the time that AMICA tendered a so-called "total loss" payment check to the Janiks (*which did not occur until late March of 1994*). This instance of unjustified misrepresentation of verdict-related facts was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 45, 47.

3e. AMICA's closing arguments included the false assertion, by me or my family, that our sewage-water-contaminated/sewage-aerosol-contaminated property needed to be cleaned to the extent that it was **"100% germ-free"**. This assertion by AMICA was improper, in light of the documentation that my family sought to have Blackmon-Mooring clean our property to EPA standards (*since Blackmon-Mooring said they would*), as well as in light of AMICA's discovery responses (see Tab N7, page JL00528, showing page 14 of AMICA's discovery response including AMICA's Response #23 to plaintiffs' document production requests). For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 45. See also Tab G1 and support.

3f. AMICA's closing argument misrepresented the nature and extent of the **loss calculations within my "Report of Loss" form** (*e.g., the curio cabinet*). This instance of unjustified misrepresentation of verdict-related facts was improper, in light of AMICA's discovery responses. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 46, as well as Tab Z.

3g. AMICA's closing argument unfairly and misleadingly suggests that **AMICA paid "policy limits"** to the Janiks, *despite the evidence that the insurance policy contract's limit for loss of use was $12,000, yet that $12,000 limit was not paid to the Janiks, but only approximately $4,000 of that $12,000 was paid to the Janiks.* Since we provided adequate documentation of our entitlement to said policy limit of $12,000 (*which is a benefit under the AMICA policy that is separate from the AMICA policy's limit of $60,000 for unscheduled personal property*), this misleading misrepresentation to the jury was inexcusable. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 42, 43, 48, and Tab H2 @ page A001652, Tab U1 and support.

3h. AMICA's closing argument misleadingly suggests that Jene Montague of **"IAS" did not seek and obtain AMICA's approval prior to authorizing the release of the contamination testing data** provided to "IAS" by Blackmon-Mooring, yet IAS/NOBEL's own documentation indisputably shows that Jene Montague did such. Accordingly, this misrepresentation to the jury was an unfair surprise and was an example of jury verdict-related misrepresentation. For support documenting this Rule 60(b) matter, please see Tab C's Tr. &B @ 49, 50, Tab G, & Tab G5.

3i. AMICA's and IAS/NOBEL's closing argument suggested that David Terry and Tom Ferris had **never dealt with any supposedly problematic (*dissatisfied*) insured like me** during his 30+ years of insurance industry experience, and further suggested that this was "everyone" else's experience in this claims handling matter. This was prejudicially misleading to the jury in light of the complaint filed with the Texas Department of Insurance – against AMICA, – involving David Terry and Jene Montague – which complainti was filed by an insured named Jones, one of AMICA's

insureds. *In addition there are numerous complaints against AMICA (and IAS was involved in Fort Worth litigation, based upon claims handling practices*). For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 45, 50, 51, 52, in conjunction with Tab J's page JL02162 and Tab K's J26026 and 26027 [also Bates-numbered as J27886-J2886]. See Tab J1 and support J2 and J14; see also K1 and support K2 through K4.

3j. AMICA's closing argument suggesting that the purposes and proposed usage of a **"proof of loss" form** was solely *so that **AMICA would know whom to pay** for my family's insured losses.* This misrepresentation inexcusably misstates the terms of the insurance contract as it defines the terms and conditions for using such a proof of loss form. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 52, as well as Tab H4 and Q1 @ item #5.

3k. AMICA's closing arguments improperly described expert Shumaker as having **"handled dozens of sewer loss claims"**, yet this highly relevant experience credential conflicts with its *non-disclosure* within his Rule 26 disclosure regarding expert Shumaker, an unfair surprise. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 52, as well as Tabs P1, P3, and P4, as well as Tab N1 and N6.

3l. AMICA's closing argument provided an unfair surprise by its negating its own **advertisements** (AMICA *"doesn't do all these things . . . "* advertised in their annual reports sent each year to all AMICA insureds; rather, Tom Ferris informed the jury that these ads were mere **"propaganda" and "baloney"**). For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 53, as well as Tab R1 @ items #1 & #2.

3m. AMICA's closing argument contained an unfair surprise by referring to expert Shumaker's opinion that

the AMICA/IAS claim handling was supposedly following **"generally acceptable claim handling practices"**, since no such standards were ever produced – either in response to the mandatory Rule 26 disclosure rule – or in response to plaintiffs' propounded discovery for such claims handling policies, procedures, and/or standards. *Also, during trial IAS/NOBEL's counsel criticized plaintiffs' expert Thomas Veitch, Esq. for not reviewing any policies and procedures manulas of IAS/NOBEL, yet neither AMICA nor IAS/NOBEL timely produced any such documents to plaintiffs, so it was impossible for expert Veitch to have reviewed such prior to the court-imposed deadline for expert Veitch's Rule 26 report.* For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 54, as well as Tabs N1, N11, N12, and N13.

3n. AMICA's closing argument unfairly relied on Dr. Seidenfeld's expert opinions on topics outside of his Rule 26 report, including a **misleading mischaracterization of the Janiks' medical history** as to bloody diarrhea, headaches, vomiting, and other sewage contamination-induced symptoms not ever simultaneously or so severely experienced by my family prior to 10-31-1993. Moreover, AMICA's closing argument unfairly relied on Dr. Seidenfeld's expert opinions as to said Dr. Seidenfeld's undisclosed opinions that conflicted with the City of Dallas' own publications[1] regarding it untreated sewage waters. (See generally Tab D materials.) For support documenting this Rule 60(b) matter, please see Tab C's Tr. Tr. 7B @ 55, 66, in conjunction with Tab D's PX #15 [Bates-identified as pages D601 through D605, as well as Tabs I1 and I2, with support I3 through I27.

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[1] Dr. Seidenfeld was retained jointly by all of the defendants.

3o. IAS/NOBEL's closing argument falsely asserted that I **hired[2] an attorney on the second day** after the Monday that I reported our insurance claim to AMICA. There was no evidence anywhere in the case of such, so this was an unfair surprise, a mischaracterization to fit the defense theme of "lawsuit abuse", and a jury verdict-tainting misrepresentation. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 59.

3p. IAS/NOBEL's closing argument falsely asserted that **I did not tender any medical records**, despite the fact that I tendered original receipts and documents obtained from our family's physicians and pharmacists. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 60, as well as Tabs I1 and I2 and support.

3q. IAS/NOBEL's closing argument falsely asserted that **my wife and I did not provide documentation of the property loss expenses, such as repair costs *(and basis for such)***, despite the fact that the I tendered original receipts and an itemized listing of my family's damaged property losses/expenses, as well as both my wife and I testifying about costs we lost or otherwise bore, which were examples of loss of use/additional living expense items (supported by trial exhibits regarding same). For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 63, as well as Tabs U2, U3, and U4 regarding cleaning, replacement, and testing amounts.

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[2] This misrepresentation was objected to and the objection was sustained as to the word "hired"; – however, within the totality of the misleading circumstances of the closing argument, this error was still likely to prejudice the jurors' view of the plaintiffs.

3r. IAS/NOBEL's closing arguments *recklessly and misleadingly* ***mischaracterized how Dr. Brandon determined my family members' illnesses, pain and suffering (including mental anguish, stress, and physical pain and discomfort)***, and other personal injury symptoms as being *caused* by my family's exposure (and re-exposure) to the sewage water-borne and sewage aerosol-borne contaminants they were exposed to on 10-31-1993 and thereafter, in combination with the stresses that immediately followed 10-31-1993, as my wife, sons, and I tried our best to put our lives back together. For support for this Rule 60(b) matter, please see Tab C's Tr. 7B @ 61, 62, 64, 65, 66, 67, 69, as well as Tabs I1 and I2 and support I3 through I20, esp. @ I21 through I27.

3s. IAS/NOBEL's closing argument, – suggesting that none of the Janik family were seen by any physician for stress and the like, – falsely misrepresents my seeing Dr. Cowden for **stress**, for which emotional stress/mental anguish-type condition/symptoms Dr. Cowden treated me. *Also, I visited baylor physicians regarding severe headaches, which is a type of physical pain and discomfort that Dr. Brandon indicated as causally correlated to the emotional stress and mental anguish I was continually experiencing during that time-frame. For support documenting this Rule 60(b) matter, please see Tab C's Tr. 7B @ 66, 67, in conjunction with Dr. Brandon's trial testimony [which is not transcribed as of today's date].* See also, e.g., Tabs I1 and I2, as well as I12 through I20.

4. <u>Testimony Surprises & Misrepresentations contra to Discovery.</u>

See generally Tab N and Tab O (attached hereto).

4a. At trial an AMICA witness relyingly alluded to a telephone log (for support for that witness' testimony),

yet that supposedly existing telephone log was timely requested by the plaintiffs (during discovery) but was prejudicially not produced by AMICA, – an unfair surprise to plaintiffs. *This telephone log was never produced to plaintiffs, despite the mandate of Rule 26 disclosure.* For support documenting this Rule 60(b) matter, please see Tab R1 @ item 10, as well as Tabs N15 and N16.

4b. At trial an AMICA witness relyingly alluded to an **emergency answering service** (which supposedly was operational on Sunday, 10-31-1993), yet that supposedly existing emergency answering service was prejudicially not disclosed by AMICA, despite discovery propounded by the plaintiffs that should have prompted such a disclosure, – an unfair surprise to plaintiffs. When I called AMICA to report our 10-31-1993 loss claim, I was told by a telephone recording to call back during normal business hours. *Also, this so-called telephone log of AMICA's was never produced to plaintiffs, despite the mandate of Rule 26 disclosure.* For support documenting this Rule 60(b) matter, please see Tabs N15, N16, and R1.

4c. The recent fabrication **"re-cap" [identified as I-80 through I-86] of IAS' Jene Montague telephone conversations with me**, and Ms. Allen's report to AMICA [I-98 & I-99], were both not timely produced to plaintiffs, but rather were only discovered after discovery was over, being part of defense expert report reviewed-and-relied-on documents provided by defense experts in response to subpoenas duces tecum. This was misconduct that prevented the plaintiffs from meaningful use of such highly relevant yet withheld documents during the discovery time-frame. ***To provide such a recent fabrication to designated experts to use in preparing their reports, yet to withhold such documents from plaintiffs as if privileged, constituted an unfair***

surprise and made **a misrepresentation-marred mockery of the litigation process.** For support documenting this Rule 60(b) matter, please see Tab L's PX #521B, consiting of pages I3 & I4, in conjunction with Tab L1 through L4. See also Tab C's Tr. 7B @ 43, 44, 49, with Tab M's M1 through M5, & M6 through M13, as well as Tab V1 & V2 through V20, as well as Tab O1 and O7.

4d. David Terry testified at trial that **a proof of loss form was a mere payment "tool"**, which contradicts the terms and conditions of the insurance contract itself, which is an example of unfair surprise and misrepresentation designed to profit from one's own wrongdoing. Similar misleading trial testimony was provided by defense expert Shumaker. For support documenting this Rule 60(b) matter, please see Tab B's Tr. 1 @ 39, 43, with Tab C's Tr. 7B @ 52, in conjunction with Tab H's pages of the "TEXAS HOMEOWNER'S POLICY" [Tab H], showing the contractually limited usage of a proof of loss form [*on policy page 5, i.e., Bates #A001659*], and noting on "Loss Payment" [*policy page 6, Bates #A001660*] that AMICA must pay us "within 5 business days" after AMICA notifies us that AMICA "will pay your [i.e., our] claim". See Tab Q1 @ item 5, as well as Tab O1 and O13.

5. Quasi-Conflict of Interest involving misuse of discovery, etc.

Very early in the discovery process, the plaintiffs sought a confidentiality agreement/protective order ("CAPO"). An oral agreement-in-principle of the parties was reached initially, to agree to a CAPO; however, this did not promptly result in a written CAPO, due to defendants reneging on the oral agreement. After a hearing before Magistrate Judge Kaplan, a CAPO was executed and entered as an order of this Court.

Months prior to trial, plaintiffs notified defendants AMICA and IAS/NOBEL of apparent violations of the CAPO and requested prompt cures thereof.

Despite these notifications AMICA and IAS/NOBEL designated and offered as trial exhibits documents containing my confidential financial information, in violation of the CAPO, to which plaintiffs objected at trial.

Plaintiffs submitted two motions during the trial to seek relief from this CAPO-violative abuse by the defendants, and plaintiffs requested this Court to specifically rule on said CAPO violation abuses. AMICA's counsel accepted representation against a client of mine, after knowing that they were litigating against me in this case. (*Prior to trial, AMICA's counsel was questioned about this by Magistrate Judge Kaplan, but AMICA's counsel was evasive about the status of the "other" (Santos) case – and now that "other" case has been re-set for trial in January 1999.*)

This harassing bad faith misconduct, appears to show that AMICA's counsel was improperly seeking to gain access to CAPO-protected confidential information of me, and then sought (with assistance of IAS/NOBEL counsel) to have such CAPO-protected information introduced into evidence at trial in this case, so that it could be unprotected (and thus used against me) in the contemporaneously pending *Santos* case.

How can a "Chinese wall" or other means of segregation be in place when two brothers (the Fanning brothers of the firm that represents AMICA) are working on two cases involving the same person (i.e., me) – an opposing party who agreed to a CAPO in one case and an opposing expert witness in the other (*Santos*) case with no protection from a CAPO.

This apparent bad faith abuse of the CAPO-related aspects of the litigation process is addressed more fully in **pages 1-8** of the "PLAINTIFFS' MOTION FOR RELIEF, AND BRIEF, INCLUDING OBJECTION TO QUASH EXHIBIT #IT-28, ETC." (filed by plaintiffs during trial on 8-23-1998), *q.v.* (See Tab Y1 and support Y2 through Y8.)

SIGNED & VERIFIED THIS 17 of November, A.D. 1998.

/s/ Ernest A. Janik, Jr.
ERNEST A. JANIK, JR., declarant

Supreme Court, U.S.
FILED
JUN 21 2001
CLERK

NO. 00-1739

In The

SUPREME COURT OF THE UNITED STATES

ERNEST A. JANIK, Jr., Individually, On behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, Individually, On behalf of Grant Joseph Janik, On behalf of Tyler Newman Janik,
Petitioners

v.

AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; AND IAS CLAIM SERVICES, INC.
Respondents

On Petition for Writ of Certiorari to the United State Court of Appeals for the Fifth Circuit

---

AMICA MUTUAL INSURANCE COMPANY'S BRIEF IN OPPOSITION

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20 June 2001

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38 pp

QUESTION PRESENTED

1. Whether an abuse of discretion occurred by denying Plaintiffs' 60(b)(3) motion and Motion to Reconsider the denial of its 60(b)(3) motion.

LIST OF PARTIES

The parties to this case are:

Ernest A. Janik, Jr., Individually, On behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; Leah Eileen Janik, Individually, On behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik;

Amica Mutual Insurance Company;

Nobel Service Corporation; and

IAS Claim Services, Inc.

Pursuant to Rule 29.1, Respondent, Amica Mutual Insurance Company is a mutual company and is not publicly traded. Additionally, none of Amica's subsidiaries are publicly traded. Amica does not have a parent corporation.

ERIC G. WALRAVEN

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NO. 00-1739

In The

SUPREME COURT OF THE UNITED STATES

ERNEST A. JANIK, Jr., Individually, On behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, Individually, On behalf of Grant Joseph Janik, On behalf of Tyler Newman Janik,

Petitioners

v.

AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; AND IAS CLAIM SERVICES, INC.

Respondents

On Petition for Writ of Certiorari to the United State Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION OF AMICA MUTUAL INSURANCE COMPANY

TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, AMICA MUTUAL INSURANCE COMPANY, (Amica), Defendant-Appellee below, respectfully submits this Brief in Opposition in response to the Petition for Writ of Certiorari filed by ERNEST A. JANIK, JR., et. al., (Janik), Plaintiff-Appellant below.

STATEMENT OF THE CASE

A. *Proceedings and Results*

This case arises from multiple personal injury and property damage claims asserted by Plaintiffs against the City of Dallas, AMICA, IAS, and Nobel based on sewage flooding on their property (R. Vol. 1, p. 1-53).

The district court granted summary judgment to AMICA on Plaintiffs' causes of action for DTPA violations, coercion and duress, breach of fiduciary duty, breach of quasi contract and unconscionable contract, (R. Vol. 48, P. 559), and to IAS on Plaintiffs' causes of action for conspiracy and unconscionable contract.

The remaining claims against AMICA, IAS, and Nobel were tried to a jury. The jury rejected all of Plaintiffs' claims except one. (R. Vol. 53, p. 5900-17). When asked whether AMICA and/or IAS failed to acknowledge with reasonable promptness pertinent communications with respect to claims arising under the policy, the jury answered affirmatively as to both (R. Vol. 53, p. 5915). Thereafter, the jury apportioned responsibility for causing Plaintiffs' damages as 25 percent attributable to AMICA and 75 percent attributable to IAS (R. Vol. 53, p. 5919). The jury then awarded Plaintiffs out-of-pocket damages for costs to clean consumer goods of $2,815.73 (R. Vol. 53, p. 5922).

Because the liability finding bore no relationship to the damages award, the court entered judgment in favor of AMICA and IAS, and dismissed all of Plaintiffs' claims against them with prejudice (R. Vol. 53, p. 5927, R. Vol. 54, p. 6197, T. Vol. 83, P. 14-15).

Plaintiffs filed a number of post-trial motions including a request that the court alter the JNOV (R. Vol. 53, p. 5928), and two requests for a new trial. All of Plaintiffs' post-trial motions were denied (R. Vol 53, p. 6673-74, R. Vol 54, p.

6197-99). Ten days after the entry of judgment, in an abundance of caution, AMICA and IAS made a renewed motion for judgment as a matter of law (R. Vol. 53, p. 404). The court denied that motion as moot in light of its denial of Plaintiffs' Motion to Alter the JNOV and Plaintiffs' Second Motion for New Trial (P. R. Ex. Tab. L).

On Nov. 19, 1998, Plaintiffs perfected an appeal of the trial court judgment to the Fifth Circuit. On Aug. 30, 1999, while the first appeal was pending in the Fifth Circuit, Plaintiffs filed a 60(b)(3) motion seeking to set aside the trial court judgment based on fraud. On October 28, 1999, the district court denied the 60(b)(3) motion. (App. A-12 -A-18) On Nov. 15, 1999, Plaintiffs filed a Motion to Reconsider the Plaintiffs 60(b)(3) motion, which was denied by the district court. (App. A-19) The Fifth Circuit affirmed the district court's ruling and adopted its opinion. (App. A-1 - A-3).

B. *Statement of Facts*

This lawsuit stems from Plaintiffs' dissatisfaction with the handling of a property claim under a renter's policy issued by AMICA and adjusted by IAS. Plaintiffs filed the claim following a sewer backup that partially flooded their rented home. Although AMICA paid the unscheduled personal property (UPP) damage limits under the policy (Vol 3b, 34), Plaintiffs had a laundry-list of complaints regarding the handling of the claim.

The IAS adjusters who worked with the Plaintiffs described Janik as "difficult." (T. Vol. 6, 173) Janik would not respond to requests for meetings, would not accept offers of help and kept issuing contradictory instructions to the adjusters (T. Vol. 6, 26; T. Vol. 7A, 4-9; T. Vol. 6, 108, 110, 112, 129; T. Vol. 3b, 3-4; D. Ex. 1-E; D. Ex. 1-F). In fact, Blackmon Mooring, the company hired by Plaintiffs to move, store and clean their furniture, described Janik's demands as impossible (T. Vol. 6, 30, 33, 77, 207-208). Their observation is supported

by the record, which shows that Janik took his furniture to three different companies for cleaning, and he was not satisfied with the work of any of three companies (T. Vol. 3b, 45-47).

The claim arose on Sunday, October 31, 1993, when Plaintiffs returned to their rented home to discover that portions of it were flooded with dirty water (T. Vol. 1C, 10). Plaintiffs did not notify AMICA of the claim on Sunday, even though adjusters would have been available (T. Vol. 6, 198-199).

The dirty water turned out to be city sewage, but Plaintiffs asserted they did not realize it was sewer water for several hours (T. Vol. 1 C, 10, 13). In any event, the Plaintiffs and their oldest son spent the afternoon and evening cleaning up their home both before and after discovering the water was sewer water (T. Vol. 1C, 14-15; T. Vol. 2, 197-99, 201).

On Monday morning, Janik called Blackmon Mooring to come and assist him in cleaning his personal property (T. Vol.2, 205-206; T. Vol. 4b, 3). Blackmon Mooring came out that day to assess the damage (T. Vol.2, 205-206).

He also called AMICA on Monday and verbally notified Amica of the claim. (T. Vol. 2, 206; T. Vol. 6, 199). AMICA immediately referred the claim to IAS, an independent claims adjusting service used by AMICA (T. Vol. 6, 199-201). IAS opened its file the next morning, Tuesday, and the adjuster, Jene Montague, called Janik on Tuesday morning to set up an appointment to tour the house (T. Vol. 2, 207; T. Vol. 4b, 6-7; T. Vol. 6, 5).

Montague arrived at the house at approximately 2:30 p.m. on Tuesday, the day after AMICA received notice of the claim (T. Vol. 1, 25; T. Vol. 2, 207). A Blackmon Mooring representative was at the house when Montague arrived (T. Vol. 4b, 8).

According to Montague, Janik told him that Blackmon Mooring was preparing estimates of what it would cost to clean and repair the property (T. Vol. 6, 7-8). Montague says that he told Janik that in his opinion the furniture would have to be moved out of the house so that the homeowner could make

repairs to the house (T. Vol. 6, 8, 10-11), and he told Janik that he would call AMICA and see if AMICA would agree to pay for a pack-out (T. Vol. 6, 9). He denies telling Janik that he could not move his furniture out of the house (T. Vol. 6, 9).

On Wednesday morning, Blackmon-Mooring removed furniture that had been standing in water (T. Vol. 1, 55; T. Vol. 2, 209; T. Vol. 3b, 5). Janik says that he was surprised by this but was told by the Blackmon Mooring representative that IAS had said it was okay (T. Vol. 1, 55).

Also on Wednesday morning Greg Upah, a former restaurant worker, turned car salesman, turned environmental consultant, with no scientific degree (Vol 3b, 5; T. Vol. 5b, 3, 27-28) visited the house at Janik's request (T. Vol. 1c, 60; T. Vol. 2, 208). After taking air samples, Upah warned Janik that the house was unsafe causing Janik to become frightened for the health of his family (T. Vol. 1c, 60).

On Thursday, Janik received testing results from Upah indicating that the kitchen floor contained asbestos particles (T. Vol. 1c, 68; T. Vol. 3b, 8). According to Janik when he called Montague on Friday morning to tell him about the asbestos, Montague told him he had better move out of the house because Montague did not want a total loss under the policy (T. Vol. 1c, 69; T. Vol. 3b, 8). Janik claims that he perceived this as a threat to either move out of the house or he would not get the money coming to him under the policy (T. Vol. 1c, 70-71).

Montague's account differs. He says that he told Janik on Thursday morning that AMICA had agreed to pay for the pack-out (T. Vol. 6, 14). During that conversation, Janik told Montague that Janik had hired Upah, and Montague told Janik that AMICA would not pay for Upah (T. Vol. 6, 16). It is undisputed that on Thursday afternoon, Janik sent Montague a fax thanking him for his excellent service (D. Ex. 1-C).

According to Montague, Janik did not tell him about the asbestos discovery until Friday, the day after Montague told Janik that AMICA would pay for a pack- out (T. Vol. 6, 15). At that time, Janik also told Montague that Blackmon Mooring

would begin removing his property from the house (T. Vol. 6, 15). Montague says that he also told Janik that because of Janik's concerns regarding the contamination, Blackmon Mooring would hire a specialist to run tests to determine if the furniture was repairable or if it would have to be replaced (T. Vol. 6, 16). There was no evidence in the record that Janik objected to hiring the chemist. Montague denies threatening Janik (T. Vol. 6, 17).

On Friday, Janik signed a contract with Blackmon Mooring backdating the contract to Wednesday, because he believed that he had to backdate the contract for the insurance to cover the pack-out (T. Vol. 1C, 70; T. Vol. 2, 210-211; D. Ex. 1-B). The contract provided that AMICA was to pay Blackmon Mooring directly (D. Ex. 1-B), but Janik subsequently rescinded those instructions (T. Vol. 6, 212-213).

Blackmon Mooring spent all day Saturday and Monday packing out the house (T. Vol. 1C; T. Vol. 3b, 9-10). Janik's furniture and belongings were all out of the house on Monday, eight days after the sewer back-up.

On Nov. 9, Janik called Montague and asked for an advance under the ALE section of the policy and also asked for a copy of the Blackmon Mooring bid (T. Vol. 6, 20). Montague promptly responded to this communication by checking the next day with Blackmon Mooring regarding the status of the estimate. He was told the estimate was incomplete (T. Vol. 6, 20). On Nov. 12, Montague sent a report to AMICA recommending that it hire an independent chemist to evaluate the contamination of Janik's property because of the disagreement between Blackmon Mooring and Janik regarding whether the property could be restored (T. Vol. 6, 20-21; D. Ex. IT 73). AMICA agreed (T. Vol. 6, 75-76, 205-206), so on the 15th, Montague directed Blackmon Mooring to hire a chemist (Vol 6, 23). AMICA was not involved with the selection of the chemist (T. Vol. 6, 205). At that time, Montague was told by Blackmon Mooring that some items had been test-cleaned and would be returned to Janik (T. Vol. 6, 25).

On Nov. 15, Blackmon Mooring delivered its estimate and asked Janik for approval to begin cleaning the property (T. Vol. 4b, 12) (D. Ex. IT-65). Janik, however, did not give Blackmon Mooring permission to proceed (T. Vol. 4B, 15) (Ex. 1-D). In fact, Janik never gave Blackmon Mooring permission to clean the property (T. Vol. 4b, 19).

On Nov. 19th, Janik went to the IAS offices to pick up the $2,000 advance check that AMICA agreed to pay even though such an advance was not provided for under the policy terms (T. Vol. 6, 25). At the office, Janik and Montague discussed Blackmon Mooring's cleaning estimate and the additional testing (T. Vol. 6, 25). Janik said he wasn't sure he wanted the property cleaned (T. Vol. 6, 25).

Montague also told Janik that AMICA needed additional information regarding the destroyed property listed on the earlier inventory before the claim could be paid (T. Vol. 6, 25-26). Montague then introduced Janik to Debbie Allen of IAS and told him she would be available to assist him in completing the forms (Vol 1C, 82-82; T. Vol. 6, 26; T. Vol. 7A, 4-5). Although Allen made repeated efforts to contact Janik regarding completing the forms, he never responded to the offers of assistance (T. Vol. 7a, 5-9)(D. Ex. IT 66).

On Nov. 21, Janik sent Montague a fax thanking him for the advance and saying he would not make any recommendations until he reviewed the chemist report (T. Vol. 3b, 14; T. Vol. 6, 27) (Ex. D. 1-D). On Nov. 30, Blackmon Mooring told Montague that it still did not have the chemist report (T. Vol. 6, 28). Again on Dec. 6, Blackmon Mooring told Montague that it still did not have a written report from the chemist, but that the tests showed heavy contamination on the items that had actually been in the flood water, but only light to moderate contamination on other items (T. Vol. 6, 28).

On Dec. 13th, Montague again spoke with Blackmon Mooring who expressed concern about Janik's demands. According to Blackmon Mooring, Janik wanted assurances that the property would be 100% germ-free (T. Vol. 6, 30).

Blackmon Mooring told Montague that it wanted to test clean some of the property to see how it worked, but that Janik was reluctant to proceed (T. Vol. 6, 28-29). Again Blackmon Mooring told Montague that it only had a verbal report from the chemist, but promised to try to get a written report as soon as possible (T. Vol. 6, 28).

On Dec. 14th, a Blackmon Mooring representative met with Montague to discuss the claim and asked for a meeting with AMICA and IAS to discuss Janik's demands (T. Vol. 6, 30). Montague says he believed that Blackmon Mooring wanted the meeting because it was concerned that it would clean the property, but that Janik would refuse to accept it, leaving Blackmon Mooring with the bill (T. Vol. 6, 30). Montague says there was no discussion of Janik attending the meeting one way or the other (T. Vol. 6, 31, 32).

The other participants in the meeting, David Terry of IAS and Tom Ferris of AMICA, concurred that Blackmon Mooring requested the meeting and that they made no effort to conceal the meeting from Janik (T. Vol. 6, 76-77, 79-80, 206-207). The IAS log book, however, has a scratch out on the list of participants (Pl. Ex. 442). Janik claimed that scratch out was his name and indicated he was deliberately excluded from the meeting (T. Vol. 2, 111-114).

On December 15, Janik sent instructions to IAS retracting his authorization for direct payment to Blackmon Mooring and requiring his signed approval before any Blackmon Mooring invoice could be paid (T. Vol. 2, 212-213; D. Ex. 18). Janik testified at trial that he became dissatisfied with Blackmon Mooring after visiting its facility because he thought it was not taking proper care of his belongings and because its workers used bad language (T. Vol. 1c, 80).

On Dec. 22, IAS, AMICA and Blackmon Mooring met to discuss the claim (T. Vol. 6, 32). At that time, Blackmon Mooring told AMICA and IAS that the chemist could not give assurances that the items would ever be completely cleaned to the point of being 100% germfree, which was what the Janiks

wanted (T. Vol. 6, 33, 77, 207-208). Following the meeting, David Terry of IAS drafted a report outlining three options: 1) clean everything and if Janik would not accept it, then work it out with him; 2) test clean a few samples and see how the samples came out; 3) declare a total loss and tender the limits (T. Vol. 6, 76; D. Ex. IT 76). After reviewing the report, AMICA's Tom Ferris said that he decided to pay the limits, believing it was the only thing that would satisfy Janik (T. Vol. 6, 210).

On Dec. 23, Janik sent a fax to Rick Mandel of Blackmon Mooring requesting a copy of the chemist report, among other items (T. Vol. 6, 33; P. Ex. 267-A). He addressed the fax to Rick Mandel, and copied it to Montague. Montague testified he did not interpret the fax as asking him for anything, because it was addressed to Blackmon Mooring (T. Vol. 6, 33-34), and because he thought Janik already knew the results (T. Vol. 6, 34).

On Jan. 3rd, Janik sent another fax addressed to both Blackmon Mooring and Montague asking for a response to the Dec. 23 fax (T. Vol. 6, 34-35; P. Ex. 268-A). Once again, because the letter was addressed to Blackmon Mooring, Montague did not think the letter was requesting anything from him (T. Vol. 6, 35).

Blackmon Mooring sent the chemist report to Janik on Jan. 11, but left off Exhibit A to the report (T. Vol. 3b, 15; T. Vol. 6, 35). On Jan. 12, Janik sent a fax to Montague asking him for Exhibit A (T. Vol. 6, 35; D. Ex. 268-A). Montague then faxed a letter to AMICA asking if he could send Exhibit A to Janik, to which AMICA immediately responded "Absolutely" (T. Vol. 6, 36-37; Ex. 268-F, 522-E, IT-74). On Jan. 14, Montague faxed the report to Janik (T. Vol. 6, 38).

AMICA's Tom Ferris testified he assumed all along that the Janiks had the test results (T. Vol. 6, 211), and he was surprised in January to learn that they did not (Vol 6, 211). Ferris further testifed he never told anyone to hide the test results from the Janiks (T. Vol. 6, 206). Likewise, Montague

said he did not realize Janik did not know about the chemist's testing results because when the meeting with the Blackmon Mooring representatives took place, the Blackmon Mooring representative talked about his and Janik's discussions (T. Vol. 6, 29).

On Jan. 14, Montague also told Janik that AMICA was ready to make a payment decision but that AMICA needed a final contents and damage listing and ALE documentation (Vol 6, 39; Ex. 268-E). After receiving a Jan. 17 fax from Janik (T. Vol. 6, 39), Montague called AMICA and asked if all the personal property was to be considered a total loss (T. Vol. 6, 39-40).

AMICA responded with a fax that it was willing to consider any items that had not been cleaned a total loss and that it would consider the cleaned items a total loss as well, if Janik was not satisfied with the level of cleanliness, but that it needed itemization (T. Vol. 6, 40; D. Ex. IT 75). On Jan. 20, Montague left Janik a voice mail saying that AMICA had decided to total all personal property, but that AMICA needed itemized documentation and that IAS would be happy to assist him in completing the documentation (T. Vol. 6, 41-43; D. Ex. IT 69).

A few days later, Montague stopped working on the claim because he was sent to California to adjust claims arising from the North Ridge earthquake (T. Vol. 6, 44). Terry then took over handling the claim for IAS (T. Vol. 6, 80-81).

On Feb. 8, at 7:30 a.m., Janik sent a fax to IAS and AMICA directing them to pay certain Blackmon Mooring invoices, but only subject to AMICA resolving Janik's problems with the Blackmon Mooring invoices (T. Vol. 3b, 17-18; T. Vol. 6, 88; D Ex. 1-E). One of the invoices that Janik directed to be paid was invoice number 497, dated Dec. 23, 1993, in the amount of $2,815.73 (D. Ex. 1E; D. Ex. 3B). The same morning, Janik sent another fax to AMICA asking AMICA to pay Blackmon Mooring *appropriately as soon as possible* (T. Vol. 3b, 18-19; Ex. 1F). Again he asked AMICA for help resolving his billing dispute with Blackmon Mooring (T. Vol.

3b, 19).

Terry responded to these faxes by contacting Blackmon Mooring in an attempt to resolve the open issues (T. Vol. 6, 87-88, 90; D. Ex. IT-70; D. Ex. IT 78). On Feb. 9, he made a report to AMICA discussing the stalemate between Janik and Blackmon Mooring (T. Vol. 6, 89-91; D. Ex. IT 78).

On Feb. 15, Janik again sent two faxes regarding payment to Blackmon Mooring. The first was addressed to David Terry and Valerie DeShotel asking AMICA to pay the *proper* amount to Blackmon Mooring (T. Vol. 3b, 20; Ex. D 1-G). He sent a second fax to David Terry asking that Blackmon Mooring be paid the proper amounts (T. Vol. 3b, 21; Ex. D 1-H).

On Feb. 15, Janik and Terry talked on the phone regarding the problems with Blackmon Mooring and payment of the claim. Janik recorded the conversation without Terry's knowledge (T. Vol. 44b, 36-42; T. Vol. 6, 92; D. Ex. IT-70). Terry told Janik that his efforts to resolve Janik's dispute with Blackmon Mooring were unsuccessful and that IAS and AMICA did not know what else they could do to assist Janik with his dispute, but that if Janik suggested something, they would be willing to pursue his suggestion (D. Ex. IT 70). Terry also explained that AMICA could make the draft for the Blackmon Mooring bill payable to both Janik and Blackmon Mooring jointly and that would protect Janik's interests and give him leverage to settle his dispute with Blackmon Mooring since Blackmon Mooring could not cash the check without Janik's signature (T. Vol. 4b, 36-42; T. Vol. 6, 92-93). Terry told Janik that AMICA did not care how the checks were cut and was willing to comply with Janik's wishes (T. Vol. 4b, 36-42; T. Vol. 6, 95-96). Janik directed Terry to cut the check jointly (T. Vol. 4b, 41; T. Vol. 5a, 4; D. Ex. IT 70). He also told Terry that he was worried about out of pocket charges from Blackmon Mooring, and Terry told him that would not happen, but if it did to call Terry and he would handle it (D. Ex. IT-70, p 3).

Terry says that when the conversation concluded, he

thought that Janik agreed the proper way to proceed was to issue two checks (T. Vol. 6, 93). Janik admitted that at the time he was talking to Terry, he agreed with Terry's suggestion to have a joint draft, but that subsequently he changed his mind (T. Vol.4b, 41; T. Vol. 5a, 4).

On Feb. 19, Janik sent another fax asking that AMICA issue a check in the *proper* amount to Blackmon Mooring (T. Vol. 3b, 22-23; Ex. D. 1-I). Terry then picked up the two drafts from AMICA and left a message for Janik telling him the drafts were ready (T. Vol. 6, 93-94). On Feb. 21, he also advised Janik by letter that two drafts were ready (T. Vol. 3b, 24-25; D. Ex. J). Janik responded by sending Terry a fax saying that Janik did not agree with the way the payment was being made and that he resented the telephone tactics (T. Vol. 6, 94; D. Ex. 1H). He then reversed his prior directions to Terry and said he wanted Blackmon Mooring paid directly (T. Vol. 6, 101).

This was the third time Janik changed his instructions regarding how to pay Blackmon Mooring. His original contract with Blackmon Mooring authorized direct payment (D. Ex. 1-B), then he retracted the agreement for direct payment (T. Vol. 3b, 3-4; Ex. 18). He directed IAS to pay certain invoices, then rescinded that order the same day (D. Ex. 1E, D Ex. 1F). Finally, Janik specifically directed IAS to cut a joint draft for the payment of Blackmon Mooring and then when his wishes were followed, he reversed himself again (D. Ex. IT 70, D. Ex. IH).

On Feb. 21, Terry sent a letter to Janik saying he did not understand the fax since he thought Janik was in agreement regarding issuance of the joint draft for $15,889.65 and that he contacted Blackmon Mooring and they had the property ready for pick-up (Vol. 6, 98). He also told Janik that AMICA was ready to pay the balance. The letter also asked Janik to let Terry know how Janik wanted to proceed on the Blackmon Mooring draft (T. Vol. 6, 99).

On Feb. 21, 1999, Terry made another report to AMICA in which he discussed Janik's about face on issuing the joint

draft for payment of Blackmon Mooring's invoice (T. Vol. 6, 99; D. IT 79). AMICA then decided to issue one check to Blackmon Mooring for $15,889.65 and another check to the insured for $44,000, but because there was a dispute between the insured and Blackmon Mooring, AMICA said it needed a signed proof of loss before IAS released the drafts (T. Vol. 6, 101-102). AMICA then reissued the draft for $15,889 payable to Blackmon Mooring only (T. Vol. 6, 101).

AMICA's Tom Ferris testified that once Janik requested the deletion of his name from the $15,889.65 draft, then AMICA needed the proof of loss as evidence of Janik's authority to AMICA to pay the claim directly to Blackmon Mooring (T. Vol. 6, 212). He said AMICA never intended to deny the claim unless the proof of loss was provided, nor was the proof of loss considered an end to the claim (T. Vol. 6, 212). Ferris said the proof of loss would act as a receipt for the money paid and as an acknowledgment by the insured that he knows where the money is going (T. Vol. 6, 213). In this case, the acknowledgment was important because of Janik's dispute with Blackmon Mooring regarding the amount of its invoices (T. Vol. 6, 213). Ferris also explained that he didn't pay the Janiks the $44,000 figure because that amount would vary depending on what was owed to Blackmon Mooring (T. Vol. 6, 229).

On Feb. 23, Terry sent a letter to Janik telling him that based on his instructions AMICA had issued a check for $15,889 to Blackmon Mooring only and a check to him and his wife for $44,110.35 ($60,000 minus 15,889) (Vol 3b, 26-27; T. Vol. 6, 102; Ex. 1-K). Terry also enclosed a proof of loss form and asked Janik to sign and return it, saying that as soon as Terry received the signed proof of loss, the drafts would be released (T. Vol. 6, 103).

On Feb. 24, Janik sent a letter to Terry complaining about his piecemeal approach to the claim, complaining that Janik's requests were being ignored, requesting a full written evaluation of Janik's losses and demanding to know when he could pick up his property (T. Vol. 3b, 30-31; Vol 6, 104; Ex.

D 1-L). Terry responded the next day by telling Janik he could pick up his property whenever he wanted as Blackmon Mooring was willing to release it as soon as it received payment (T. Vol. 3b, 32; Ex. D1-M). Terry also explained he had not yet evaluated the ALE claim because he did not believe he had all the expenses (T. Vol. 6, 104). He again reiterated that AMICA was ready to deliver the drafts upon receipt of the proof of loss and he again explained to Janik that AMICA's policy did not provide coverage for medical expenses (T. Vol. 3b, 32-33; T. Vol. 6, 105-107).

On Feb. 28, Janik sent Terry a letter again complaining about Terry's failure to respond on the ALE claim (Vol 3b, 34-36; T. Vol. 6, 107-108; Ex. D 1-N). On March 2, Terry wrote Janik and explained that Terry hadn't responded on the ALE claim because he did not think he had all the expenses and he also asked Janik to call him regarding the ALE claim (T. Vol. 3b, 36-37, Vol 6, 108; Ex, D 1-O). Janik never responded to Terry's request for a phone call (T. Vol. 6, 109). Terry again told Janik the drafts were ready to be released as soon as the proof of loss was signed and that signing the proof of loss would not affect his ALE claim (T. Vol. 3b, 36-37; T. Vol. 6, 108-109).

On March 7, Terry sent Janik another letter telling him he didn't understand and couldn't read some of the documentation submitted in support of Janik's ALE claim and again asking for a meeting so they could review the information together (T. Vol. 3b, 38-39; T. Vol. 6, 110; Ex. D 1-P). Janik never responded (T. Vol. 6, 112).

In the March 7 letter, Terry again stated the two drafts were ready and would be released to Janik as soon as IAS received the proof of loss (T. Vol. 3b, 39; T. Vol. 6, 110-111). On the same date, Terry forwarded his fourth report to AMICA regarding the handling of the claim and explained his difficulty getting documentation from Janik regarding the ALE claim (T. Vol. 6, 112-113; D Ex. IT 80). AMICA responded that Terry should work up the claim as best he could so that AMICA could

get the claim paid (T. Vol. 6, 114).

After reviewing the ALE documentation, Terry sent a letter to Janik on March 9 outlining what expenses Terry thought would be covered under the ALE and enclosing a proof of loss for the ALE (T. Vol. 6, 127-129). Terry again offered to discuss the claim with Janik (T. Vol. 6, 129).

On March 9, Terry made another report to AMICA (T. Vol. 6, 132; D. Ex. IT 81). In that report, Terry noted that after reviewing the policy, he thought the proof of loss provision may have been waived (T. Vol. 6, 133). He then recommended that AMICA forget about the proof of loss, because the claim wasn't moving and AMICA was a company that always gave the insured the benefit of the doubt anyway (T. Vol. 6, 133).

During his testimony, Janik noted that one draft of the March 9 report discussed waiver of the proof of loss provision and one draft did not (T. Vol. 2, 81). Terry said the draft containing the discussion of the waiver was the one that went to AMICA, because he specifically wanted to include it as an issue (T. Vol. 6, 133-134).

On March 21, Terry sent Janik another letter saying AMICA was ready to pay both the UPP claim and the ALE claim upon receipt of the proofs of loss (T. Vol. 3b, 40; T. Vol. 6, 134-135; Ex. D 1-Q). On that day, Terry also sent another report to AMICA telling AMICA that Janik had requested another advance and that Janik had paid Blackmon Mooring himself (T. Vol. 6, 135-137; D IT 83). As soon as AMICA heard that all of the money would go to Janik, it told Terry it no longer needed the proof of loss and directed payment to Janik immediately (T. Vol. 6, 138, 218).

On March 23, AMICA mailed a Janik a $60,000 draft (T. Vol. 1C, 92; T. Vol. 3b, 40-41; T. Vol. 6, 139-140; D. Ex. 1-R). He also sent Janik a check for $1,020.42 for additional living expenses and said that he would be sending a check for $115.16 for Janik's film developing costs (T. Vol. 3b, 41).

On March 28, Terry again wrote to Janik offering to meet with him if he had any questions regarding the ALE claim

(T. Vol. 6, 140-141). In April AMICA's branch manager met with Janik in an effort to resolve Janik's unhappiness regarding the claims handling (T. Vol. 6, 219-220). The attempt at resolution was unsuccessful.

After Janik picked up his property from Blackmon Mooring, he took it to Restoration Specialist, but he wasn't satisfied with its work either (T. Vol. 3b, 45-47), so he took some of the property to a third cleaning specialist and he threw the remaining property away (T. Vol. 3b, 45-47).

ARGUMENT

I. Whether an abuse of discretion occurred by denying Plaintiffs' Motions to set aside the trial court judgment based on fraud.

A. Standard of Review

Appellate courts review a trial court's denial of a 60(b)(3) motion for abuse of discretion. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978). Rule 60(b)(3) permits a court to "relieve a party ...from a final judgment...for....fraud...misrepresentation, or other misconduct of an adverse party...." Fed. R. Civ. P. 60(b)(3). A party seeking to set aside a judgment on these grounds, however, must meet the following standard: he must demonstrate by clear and convincing evidence that 1) the adverse party engaged in fraud or other misconduct; 2) he must show that the misconduct foreclosed full and fair preparation or presentation of his case. *Government Financial Servs. One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 772 (5th Cir. 1995); *Rozier v. Ford Motor Co.*, 573 F.2d at 1339. As with all defects in the course of litigation, in order to warrant relief, he must show that the

error was harmful–it must have affected the substantial rights of the movant. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 924 (1st Cir. 1988)(citing Federal Rule of Civil Procedure 61).

If the motion is based on the movant's allegation that the adverse party concealed evidence during the discovery process, then the movant must show that the concealed evidence substantially interfered with his ability to prepare for trial. *Id.* Substantial impairment may be shown by establishing the material's likely worth as trial evidence or by elucidating its value as a tool for obtaining meaningful discovery. *Id.* at 926. It may exist if a party shows that the concealment precluded inquiry into a plausible theory of liability, denied it access to evidence that could have been probative on an important issue or closed off a potentially fruitful avenue of direct or cross examination. *Id.* at 925. In other words, the allegedly concealed information must be materially related to the primary issue. *See MCI Telecommunications Corp. v. Matrix Communications Corp.*, 171 F.R.D. 7, 9 (D. Ma 1997), *aff'd.*, 135 F.3d 27, 34 n.13 (1st Cir. 1998).

Moreover, the movant must have actively concealed information during the discovery process. Fraud in responding to discovery is more than simply putting opposing counsel to the burden of getting a discovery order. *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505,509 (7th Cir. 1982). Additionally, no fraud exists where the allegedly withheld documents were never specifically requested nor diligently sought. *Chrysler Corp. v. Superior Dodge, Inc.*, 83 F.R.D. 179, 195 (D. Md. 1979). Finally, a narrow or precise answer to the question actually asked and the failure to volunteer more information does not constitute misconduct. *Harduvel v.*

General Dynamics Corp., 801 F. Supp. 597, 608-09 (M.D. Fla. 1992).

Lastly, a movant may not be entitled to relief where the alleged misconduct was discovered in time to oppose it, since the actual cause of the adverse judgment is not the alleged misconduct but the movant's failure to act. *Cutler v. Lewiston Daily Sun* 103 F.R.D. 172, 174-75 (Me. 1984)(relief not warranted where the cause of an adverse summary judgment was not defendant's misstatement in its motion for summary judgment that certain facts were undisputed, but plaintiff's own failure to timely file written objections.) *See also Ojedo-Toro v. Rivera-Mendez*, 853 F.2d 25, 29 (1st Cir. 1988)(party cannot prevail on a 60(b)(3) motion where movant had knowledge of alleged misconduct.)

B. 60(b)(3) Motion and the Motion to Reconsider

Plaintiffs sought to set aside the judgment because of the following acts of alleged "fraud": 1) Amica allegedly withheld documentary evidence that it was number one in customer satisfaction; 2) IAS allegedly gave Plaintiffs confusing information regarding its identity; 3) Amica and IAS allegedly delayed in producing recap notes; 4) AMICA and IAS failed to produce any documentary evidence that Plaintiff Ernest Janik wanted his furniture 100% germ-free; 5) AMICA and IAS failed to produce any documentary evidence regarding acceptable claims handling procedure or that AMICA routinely gave the benefit of the doubt to its insureds; 6) a defense expert allegedly testified outside the scope of his expert report.

Although Plaintiffs complain that they were unable to prepare for trial because of Amica's and IAS's gamesmanship during discovery, Plaintiffs never asked for most of the material

they subsequently complained they didn't receive. Any material they asked for and did not receive was the subject of a timely objection by Amica. Plaintiffs did not bring any motions to compel against Amica during the entire eighteen-month discovery period (Exhibit "A" and Exhibit "B" to Amica's Response to Plaintiff's Motion for Relief from Judgment[1]). Assuming that Plaintiffs believed Amica was being obstreperous in its discovery responses, then they should have filed a motion to compel discovery, rather than wait until they received an adverse judgment and then cry foul.

Plaintiffs also complain they were surprised by some of the testimony at trial. Yet, Plaintiffs did not take a single deposition of a defense fact witness nor of a defense expert witness prior to trial. (Exhibit "A" and Exhibit "B" to Amica's Response to Plaintiff's Motion for Relief from Judgment) Undoubtedly, Plaintiffs were surprised by some of the testimony at trial. This surprise, however, did not result from Amica's "gamesmanship." It was caused solely by Plaintiffs' lackadaisical approach to trial preparation.

1. **It was not an abuse of discretion to refuse to set aside the judgment set aside because Amica allegedly concealed information that it is Number 1 in customer satisfaction, because Plaintiffs presented no evidence that they ever made a discovery request that encompassed this information and they presented no evidence of how this alleged failure to disclose hindered trial preparation.**

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[1] Record references are not available for the 1999 district court actions.

Plaintiffs' complain that defense witnesses testified during trial that Amica was number one in consumer satisfaction and that they were not given this information during the discovery process. First, as the district court noted, the Plaintiffs did not produce any evidence that they made a discovery request that encompassed this information. *See Chrysler Corp. v. Superior Dodge*, 83 F.R.D. at 195. Amica was under no obligation to provide information about consumer happiness with its services unless such information was the subject of a proper discovery request and relevant to the lawsuit. Without evidence that Plaintiffs made such a request, Plaintiffs cannot establish misconduct by clear and convincing evidence.

Additionally, no evidence existed that the alleged withholding of information about Amica's high level of customer satisfaction in any way impaired Plaintiffs' ability to prepare for trial. *See Rozier v. Ford Motor Co.*, 573 F.2d at 1339 (must show misconduct prevented full litigation of the case). The alleged evidence that Amica is the highest-rated insurance company in the land would not have helped Plaintiffs in their quest to establish Amica as uncaring and bullying. It would not have helped in their quest for punitive damages. This information would not have established a theory of liability nor did it foreclose an avenue of cross-examination.

As the district court observed, Plaintiffs acknowledged that they had information in their possession regarding consumer complaints regarding Amica's services, but they chose not to use this information to cross-examine Amica's witnesses because it was a timed trial. In essence, Plaintiffs admit that it was their own litigation strategy that stopped the cross-examination, not any alleged misconduct on the part of

Amica. In retrospect, Plaintiffs may regret some of their decisions regarding strategy, but those decisions were not due to the misconduct of Amica and IAS and cannot be used to set aside the judgment.

2. It was not an abuse of discretion to refuse to set aside the judgment because Plaintiffs were "confused" about IAS' identity.

Plaintiffs failed to establish by clear and convincing evidence any misconduct with regard to the identity of IAS. The only evidence that Plaintiffs pointed to as evidence of misconduct in this regard was Exhibit "B" to their first motion, which was a copy of letter from IAS counsel to Plaintiffs' counsel outlining the corporate history of IAS. Plaintiffs did not produce any evidence that this corporate history was incorrect. Instead, their sole contention was that it was confusing. Plaintiffs' confusion over evidence does not justify a new trial.

Plaintiffs' Exhibit "B" shows that IAS has undergone several corporate reorganizations, acquisitions etc. with accompanying name changes. This is not unusual in today's business environment. The footnotes in the letter indicates each of the representations was backed up by reference to an official document. Plaintiffs did not alleged any of these documents were incorrect. Because Plaintiffs have not produced any evidence of misconduct with regard to IAS' identity, they are not entitled to have the judgment set aside on that ground.

Plaintiffs' also claim that IAS representative David Terry's testimony at trial conflicted with Exhibit "B." First, not every discrepancy in testimony rises to the level of fraud. *See*

Washington v. Patlis, 916 F.2d 1036, 1039 (5th Cir. 1990)(holding conflicting testimony does not constitute clear and convincing evidence of fraud under 60(b)(3)). Second, Plaintiffs were free to present that conflicting information to the jury and have the jury interpret the meaning of the conflict. *See Id.* Plaintiffs' attorney could easily have shown Exhibit "B" to the jury and reminded the jury of David Terry's testimony, and argued that this information was confusing. Plaintiffs are apparently unhappy because they only picked up on the alleged conflict between David Terry's testimony and Exhibit "B" at trial. They, however, likely would have heard David Terry's explanation before trial, if they had bothered to depose him.

Finally, it is unclear why this alleged confusion is even relevant. IAS stipulated as to who was the proper party to the litigation. IAS didn't escape from the judgment because of a misnomer in the complaint, and Plaintiffs were not prevented from putting on any evidence of liability because of this alleged confusion. The entire matter is a red herring. Unless the alleged fraud is materially related to a submitted issue, it is not grounds for setting aside a judgment. *See MCI Telecommunications Corp.* 171 F.R.D. at 9.

3. It was not an abuse of discretion to refuse to set aside the judgment because of a delay in producing the recap notes since it is undisputed that Plaintiffs had the recap notes almost a year before trial.

Plaintiffs admit they had the recap notes prior to trial, because defense experts provided them. (R. Vol. 56, p. 0013) In fact, the expert files were first produced to Plaintiffs almost a year before trial. (See Exhibit "B" to Amica's Response to

Plaintiff's Motion to Set Aside the Judgment). A movant may not prevail on a 60(b)(3) motion when he had access to the information. *Ojeda-Toro v. Rivera-Mendez*, 853 F.2d at 29. Thus, evidence which Plaintiffs had for more than a year before trial cannot serve as a basis for setting aside a judgment.

Plaintiffs' complaint about the recap notes is that his experts did not have them when filing their report. This complaint is without merit. Plaintiffs' expert Robert Lazarus filed a supplemental expert report on Jan. 7, 1998 in which he discussed the recap notes. (See Exhibit "C" to Amica's Response to Plaintiff's Motion to Set Aside the Judgment). This supplemental report was filed more than eight months before trial. Thus, the alleged delay in producing the recap notes did not hinder Plaintiffs' trial preparation.

4. It was not an abuse of discretion to refuse to set aside the judgment because AMICA failed to produce documents showing that Plaintiffs wanted their furniture 100% germ free, as there is no evidence that such documents exist.

Plaintiffs produced no evidence that AMICA has documents reflecting that Plaintiff wanted his furniture 100% germ free. Unless AMICA had such documents in its possession, custody and control, it was not obligated to produce the documents. Fed. R. Civ. P. 34.

Moreover, Plaintiffs produced no evidence that they made any discovery requests that encompassed such documents, if they exist. The Plaintiffs complained that defense witnesses testified that Janik wanted his furniture 100% germ free (T. Vol. 6, 30). The testimony of the defense witnesses, however,

appears to be based on anecdotal information exchanged among the various defense witnesses. No one testified that Plaintiffs made a written request that the furniture be 100% germ free. Plaintiffs might have been justified in objecting to this testimony as hearsay, or otherwise impeaching the testimony, but they are not entitled to have the judgment set aside based on the testimony. Moreover, they possibly would not have been surprised by the testimony if they had ever bothered to take the deposition of a defense witness prior to trial. Finally, Plaintiffs conceded they were able to dispute this information by presenting their own evidence to the jury that Plaintiffs wanted the materials cleaned to EPA standards. Thus, without more, Plaintiffs were certainly not entitled to, and the Fifth Circuit did not err by refusing, a new trial.

5. It was not an abuse of discretion to refuse to set aside the judgment because AMICA failed to produce documents regarding generally acceptable claims handling practices or documents that demonstrated that it routinely gave the benefit of the doubt to the insured, as there is no evidence that such documents exist.

Plaintiffs produced no evidence that AMICA had documents regarding generally acceptable claims handling procedures in its possession, custody or control. Unless AMICA had such documents in its possession, custody and control it was not obligated to produce the documents. Fed. R. Civ. P. 34(c). Although Amica's expert Ken Shumaker testified regarding generally accepted claims handling procedures, his testimony indicates that the basis for this testimony was his many years in the insurance industry. (T. Vol. 6, p. 234-259).

Likewise, a review of the testimony from witnesses that Amica routinely gave the benefit of the doubt to its insureds seems to be based on the witnesses experience in the industry and not on any written document that they reviewed. (T. Vol. 6, p. 109-112).

6. It was not an abuse of discretion to refuse to set aside the judgment because a defense expert testified outside the scope of his report.

Assuming that the defense expert testified outside the scope of his expert report, then such testimony was improper. *See* Fed. R. Civ. P. 26(a). The remedy, however, is for Plaintiffs to move to have the testimony stricken. *See* Fed. R. Civ. Prac. 37(c). No authority exists for the proposition that testimony exceeding the scope of an expert report justifies setting aside a judgment.

7. It was not an abuse of discretion to deny Plaintiffs' motion to reconsider because the motion to reconsider to meet the required heavy burden to set aside a judgment.

Plaintiffs' Motion to Reconsider was devoid of any evidence showing that the trial court had abused its discretion in denying the Motion to Set Aside Judgment. Indeed, all of the evidence submitted in support of the Motion to Reconsider supports the trial court ruling.

Specifically, with regards to their complaints that Amica withheld information that it was number one in consumer satisfaction, Plaintiffs claim they were damaged by this lack of

disclosure because as a result, they fail to used Plaintiffs Ex. 431, 432 and 433 which allegedly involved thousands of pages of complaints against Amica. (PL. R. Ex. 2, tab H, p. 8). Plaintiffs admit that they had the impeachment evidence ready and available at trial. It was simply because they chose to present other evidence, that they did not emphasize this evidence to the jury. It had nothing to do with any alleged withholding of material by Amica.

With regards to their complaints regarding the testimony that Amica always gave its insured the benefit of the doubt, that Plaintiffs wanted their furniture to be 100% germ free and Amica's claims-handling procedures, they failed to produce any evidence that written material to that effect existed as opposed to the testimony being based on the experience of the witness or anecdotal information.(PL. R. Ex. 2, tab H, p. 9, 10, 12).

8. It was not an abuse of discretion to refuse to set aside the judgment because the alleged withholding of the complained of material deprived Plaintiffs' of their constitutional right to trial by jury.

Plaintiffs argue they were deprived of a trial by jury because the alleged discovery abuse resulted in Amica receiving summary judgment on some of the causes of action asserted against Amica by Plaintiffs and in receiving a JNOV following trial on the merits.

First, Plaintiffs did not raise this below in their 60(b)(3) motion or the motion to reconsider and is therefore waived. *Cf. Williams Transportation v. Times Warner Operation, Inc.*, 98 F.3d 179, 183 (5th 1996)(refusing to review argument not raised in response to motion for summary judgment).

Second, Plaintiffs have already raised this issue in their brief filed in a previous appeal. Thus, this is an impermissible attempt at two bites of the apple. Moreover, if Plaintiffs felt evidence was being withheld that would have precluded summary judgment on those claims, they should have filed a motion for extension of time to respond to the summary judgment so that discovery could be conducted under Federal Rule of Civil Procedure 56(f). They still would have had to ask for the material and in most cases there is no evidence that they did so. In addition, the material still must exist before Amica would have an obligation to produce it.

It is unclear how this alleged material, if it existed, would have changed the partial summary judgment. Amica received summary judgment on Plaintiffs' causes of action for DTPA, coercion and duress, breach of fiduciary duty, breach of quasi contract and unconscionable conduct. Plaintiffs do not explain how any of the allegedly withheld material relates to any of these causes of action. To the extent that the recap notes might have affected Plaintiffs' defense to any of the summary judgment claims, it should be noted that AMICA did not receive partial summary judgment until June 1998. (R. Vol. 48, p.559). Plaintiffs had the recap notes in their possession for months by then, as their expert had filed a supplemental report on January 7, 1998, discussing the recap notes. (Exhibit "C" to Amica's Response to Plaintiff's Motion).

CONCLUSION

For the reasons stated, the Supreme Court of the United States should affirm the opinion of the United States Court of Appeals for the Fifth Circuit, and grant such further relief as is just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing instrument have been mailed via first-class mail to the following parties of record in compliance with this Court's rules on this 20th day of June, 2001:

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Supreme Court, U.S.
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No. 00-1739

In the

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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A. By failing to file a Brief in Opposition, both IAS Claim Services, Inc. and Nobel Service Corporation are deemed to not dispute the legal points asserted by the Janiks 3

B. Amica's overall response point is a "straw-man" (an inapplicable legal standard), because Fed.R.Civ.P. Rule 60(b)(3) "other misconduct" is not limited to proof of "fraud" – in fact, this very issue is subject of a "split" in the federal circuits 3

C. Amica has failed to dispute the following 4 critical points (asserted in the Petition), so these 4 points should be seen as undisputed:

(1) this case's pivotal federal question involves a "split" in the federal circuits on the proper usage of Rule 60(b)(3), especially as it relates to remedying violations of Rule 26(a)(1) and Rule 26(e)(1) 5

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FACT ISSUES

Amica's Brief in Opposition often misstates material facts that were genuinely disputed at the summary judgment level. In fact, Amica avoids most of Petitioners' legal arguments by filling half of Amica's pages with a highly skewed packaging of so many **half-truths** and misleading misstatements of "fact", that Petitioners' page-limit herein prevents a comprehensive seriatim refutation thereof (but this could be done at a later phase herein). However, an example or two may illustrate how misleadingly Amica has portrayed the salient "facts".

E.g., Amica implies (at 3-16 of its Brief) that it had a legal right to withhold payment of the Janiks' insured loss claim by conditioning such payment on Mr. Janik signing a "proof of loss" form (re Amica's demands, see Trial Record at pp. 6012-6013, saying):

> Enclosed is the Proof of Loss [*form*] for the policy limits of $60,000.00 which you need to sign and return to me. Upon receipt of the signed Proof of Loss, the draft in the amount of $44,110.35 will be forwarded to you. . . .
>
> [*and again, 12 days later*]
>
> Amica is ready to issue the two drafts of $44,110.35 and $15,889.65 for your policy limits upon receipt of the signed Proof of Loss previously forwarded to you. . . .

But the above-quoted demands (dated 2-23-1994 and 3-7-1994) were asserted in **bad faith**, since Amica had already waived its right to insist on using such a form. Mr. Janik FAXed a notice of property loss to Amica on 11-4-1993, 4 days after the loss event (which occurred

10-31-1993). Amica did not request a proof of loss from the Janiks until 2-23-1994, obviously more than "15 days" after Mr. Janik FAXed his 11-4-1993 notice to Amica. Amica's insurance contract provides that "we [Amica] must request a signed sworn proof of loss within 15 days after we receive your written notice [of a claimed loss], or we [Amica] waive our right to require a proof of loss".

In fact, the form Amica wanted signed would have waived or compromised the Janiks' claims for extra-contractual damages (not capped by the "policy limits").

Thus, 15 days after 11-4-1993, Amica waived the right to insist on Mr. Janik signing a proof of loss form. See trial exhibit PX-519JJ, shown at 5th Circuit Appeal 98-11369 Record Excerpts' Tab O, buttressed by trial testimony admissions (shown at *id.*'s Tab N), and by Mr. Janik's notice FAX of 11-4-1993 (shown at *id.*'s Tab Q), and by PX-519J at *id.*'s Tab P (contract term: "If we notify you that we will pay your claim, or part of your claim, we must pay within 5 business days after we notify you"). Thus, the "facts" recited in Amica's Brief actually demonstrate Amica's inexcuseable **economic coercion, breach of contract, DTPA violations** (including unconscionability), **unfair insurance practices**, and **bad faith** in delaying payment on the Janiks' noticed property loss claim.

In fact, the delays in communications by Amica and IAS/Nobel were specifically found, by the jury, to be examples of "**unfair or deceptive act[s] or practice[s]**" violating the Texas Insurance Code. See Doc 393 [Verdict] at pp. 19, 22. The trial court's JNOV improperly discarded these jury factfindings, as the record in 5th Circuit Appeal 98-11369 shows.

The Janiks were ambushed at trial with surprise testimonies "at the midnight hour", – some defense experts even parroting the same phrases verbatim, – from supposedly independent outside expert witnesses. The many unfair surprises at trial demonstrated bad faith discovery abuse/concealment and/or "coached" witness collusion, as noted below, since the surprise testimonies were not included in Rule 26(a)(2)(B) expert reports, were not disclosed per Rule 26(a)(1), and were not supplemental per Rule 26(e)(1).

The two IAS/Nobel defendants ("IAS/Nobel") have failed to file a Brief in Opposition herein, so their silence regarding the facts asserted herein by the Janiks against IAS/Nobel are uncontested. IAS/Nobel, to date, has not served the undersigned with any kind of a brief herein. Pursuant to Supreme Court Rule 15.2, IAS/Nobel's failure to file a Brief in Opposition is deemed to waive any objections regarding facts asserted against the two IAS/Nobel defendants via the Janiks' Petition.

ARGUMENTS

A. ***By failing to file a Brief in Opposition, both IAS Claim Services, Inc. and Nobel Service Corporation are deemed to not dispute the legal points asserted herein by the Janiks,*** **as to legal points asserted by the Janiks in their Petition herein.** See Supreme Court Rule 15.2 (regarding respondent's duty to object re legal issues).

B. ***Amica's overall response point is a "straw-man" distraction (an inapplicable legal standard), because Fed.R.Civ.P. Rule 60(b)(3)'s term "other misconduct" is***

***not limited to proof of "fraud" scienter* – in fact, this is the very issue on which Petitioners have documented a "split" in the federal circuits.** See, accord, cases from federal circuits other than the 5th Circuit, e.g., *Licciardi v. TIG Ins. Group*, 140 F.3d 357 (1st Cir. 1998); *Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1993); *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994); *United States v. One Douglas A-26B Aircraft*, 662 F.2d 1372 (11th Cir. 1981); *Fraige v. American-Nat'l Watermattress Corp.*, 996 F.2d 295 (Fed. Cir. 1993), – **in contrast to the 5th Circuit's practice of scrupling "misconduct" by a "it-must-be-so-egregious-it-amounts-to-fraud" standard for Rule 60(b)(3) motions,** as illustrated by *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1341-1346 (5th Cir. 1978) ("sabotage" of trial process illustrating the 5th Circuit's de facto "it-must-be-fraud" norm).

But, by the "plain language" of Rule 60(b)(3) ("other misconduct"), the 5th Circuit may **not** burden the Janiks to prove "fraud" as to defendants' discovery non-compliances, because non-fraudulent forms of "other misconduct" can justify Rule 60(b)(3) relief, apart from the "why" behind non-compliances (including non-disclosures and non-supplementations of Rule 26(a)(2)(B) information). *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994). As a practical matter, due enforcement of Rule 60(b)(3) provides an incentive for advocate compliance with the rules, and a disincentive for "conveniently" failing to comply with them. *Fraige v. American-Nat'l Watermattress Corp.*, 996 F.2d 295 (Fed. Cir. 1993); *Klonoski v. Mahlab*, 156 F.3d 255 (1st Cir. 1998) (***using Rule 60(b)(3) to void surprise-tainted "trial by ambush"***). In effect, refusing to extend application of Rule 60(b)(3) to non-fraudulent "other misconduct" renders the rule's phrase

"other misconduct" pleonastic, – *Anderson v. Cryovac*, 862 F.2d 910, 923 (1st Cir. 1988), as quoted in *MMAR Group, Inc. v. Dow Jones & Co., Inc.*, 187 F.R.D. 282, 285 (S.D. Tex. 1999), – effectively licensing non-compliance that is difficult to prove later as "fraud".

C-1. **Amica has failed to dispute that this case's pivotal federal question involves a "split" in the federal circuits on the proper usage of Rule 60(b)(3), especially for remedying violations of Rule 26(a)(1) and Rule 26(e)(1).** See Petition at 3, noting "split" and citing Supreme Court Rule 10(a).

C-2. **Amica has failed to dispute that Amica failed to fulfill mandates of Rules 26(a)(1) and 26(e)(1), which include automatic obligations to provide disclosure of "re-cap" notes (i.e., documents mandatorily discloseable wholly apart from any discovery requests propounded by the plaintiffs), – and such withheld Rule 26-mandated documents prejudiced the Janiks' ability to oppose a partial summary judgment.** Amica's own outside expert quoted excerpts of the intentionally withheld "re-cap" notes in his Rule 26(a)(2)(B) report, yet the Janiks were blocked from using those notes at the Rule 56 phase. Amica's only mention of a Rule 26(a)-based duty (see Amica Brief at 25) alludes to a testifying expert's duty of an expert to avoid testifying "outside" of his expert report, which pertains to Rule 26(a)(2)(B). This tellingly side-steps the Rule 26(a)(1)/26(e)(1) duties of defendants to fairly disclose all documents that pertain to the facts put in issue by the pleadings, – inexcuseably evading defendants' duties under Rule 26(a)(1) to disclose all documents (initially and by supplements) "relevant to

disputed facts alleged with particularity in the pleadings". See Doc #443 at 8, 9-19, & Petition for Certiorari at 7-8. *Licciardi v. TIG Ins. Group*, 140 F.3d 357 (1st Cir. 1998) (***unfair surprise from trial expert who opined on a new topic of testimony frustrated the disclosure principle regulating expert reports, being "highly prejudicial", thus justifying Rule 60(b)(3) reversal and remand for new trial***).

The trial court, the appellate panel, and the defendants have *all* repeatedly ignored the mandatory and automatic nature of these rule-specified disclosure obligations, – despite heavy emphases by the Janiks about the automatic nature of Rule 26(a)(1) and Rule 26(e)(1), due to disputed fact topics raised by the Janiks' trial court pleadings. See, e.g., 5th Circuit Opening Brief at 29-31 & 35-39; 5th Circuit Record Excerpts' Tab H, showing Doc #447 (esp. at 4-6); 5th Circuit Reply Brief at 10, 21, & 27; 5th Circuit Petition for Panel Rehearing at 2, 4-5; Petition for Certiorari at 7-8, citing applicable paragraphs in the Janiks' 3rd Amended Complaint. See also, accord, Janiks' 11-15-1999 Motion for Rehearing (**Doc #443**).

C-3. **Amica has failed to dispute that this case involves a "tilted" jury selection process (via screening out prospective jurors who ever felt cheated by an insurance company, as opposed to ever having been cheated by defendant Amica)**, frustrating Due Process. See Petition at 4-5; 5th Circuit Opening Brief at 49.

C-4. **Amica has effectively admitted, via its *volte-face* regarding collusion/coaching of the joint defense witnesses, that the defendants' jointly retained outside experts "exchanged" testimony information, and thus**

they sang the same undisclosed song at trial. The testimony surprises by the joint defense experts were not in their Rule 26(a)(2)(B) reports, not disclosed per Rule 26(a)(1), and not supplemented per Rule 26(e)(1). Defense experts' new and collusive "lyrics" were unfair surprises at trial. See Petition at 4-5; Doc 3443 at 59. How does Amica explain coincidentally similar or verbatim-identically-phrased "lyrics" by such defense experts, in light of there being no Rule 26(a)(1)/(e)(1) disclosures? Such parroted refrains were "anecdotal information exchanged among the various defense witnesses." See Amica's 5th Circuit Brief at 35-36.

D. **Amica misstates the legal error related to "#1 in customer satisfaction"** surprise testimonies. See Argument C-2 above, regarding witness collusion. Also, discovery requests should have "trapped" this information. Doc #443 at 5, 9-10, 20-24, & Petition at 4, 9, 13, regarding evasive/misleading responses to discovery requests.

E. **Amica misstates the legal error about the confusing identity of who its agent "IAS" was**. See Argument C-2 above, regarding witness collusions. Also, discovery requests should have "trapped" this information. See Doc #443 at 6, 10-12, 24-32, & Petition at 4, 11-12, regarding obstructionist discovery responses, unfair Rule 56 motion practice, and trial testimony surprises.

F. **Amica misstates the legal error regarding withholding of expert-used "re-cap" notes** surprise testimonies. See Argument C-2 above, regarding witness collusion. Also, discovery requests should have "trapped" this information. See Doc #443 at 4-6, 17-18, 39-43, & Petition at 4, 10, regarding discovery requests cites.

G. **Amica misstates the legal error regarding the so-called "100% germ-free" cleaning demand** surprise testimonies. See Argument C-2 above, regarding witness collusion. Also, discovery requests should have "trapped" this information. See Doc #443 at 5, 18-19, 43-48, & Petition at 4, 19, regarding obstructionist responses.

H. **Amica misstates the legal error regarding how its witnesses, including outside experts, coincidentally testified about so-called "generally accepted claims handling practices" and its supposed policy of giving its insureds' the "benefit of the doubt", since these surprises violated Rules 26(a)(2)(B), 26(a)(1), and 26(e)(1).** See Doc #443 at 5, 10, 12-17, 20-24, 32-39, & Petition at 4, 18-21. Regarding Rule 26(a)-mandated disclosures and trial expert misconduct problems, see *Musselmann v. Phillips*, 176 F.R.D. 194, 198-199 (D. Md. 1997); *BCF Oil Refining v. Consolidated Edison Co. of N.Y.*, 171 F.R.D. 57, 65 (S.D.N.Y. 1997).

I. **Amica misstates the legal error regarding the unfairly surprising trial testimonies of the report-straying joint defense experts.** See Doc #443 at 6-7, 50-51. Unfair surprises at trial by testifying experts sometimes cannot be cured by a sustained objection or continuance. Cf. *Licciardi v. TIG Ins. Group*, 140 F.3d 357 (1st Cir. 1998). Rule 26(e)(1) violation "misconduct", such as occurred in the Janik case, should be disincentively thwarted by awarding Rule 60(b)(3) relief. See *Klonoski v. Mahlab*, 156 F.3d 255 (1st Cir. 1998); *Viskase Corp. v. American Nat'l Can Co.*, 979 F.Supp. 697, 700 (N.D. Ill. 1997).

J. **Amica misstates the legal error regarding the Rule 60(b)(3)'s burden of proof standard.** A case of discovery evasiveness that prejudices a plaintiff, even though it is not committed with "nefarious intent or purpose", is fair game for Rule 60(b)(3) relief. See *Anderson*, 862 F.2d 910 (1st Cir. 1988). So, Rule 60(b)(3) does not require the Janiks to prove a "fraud on the court" by Amica (or by IAS/Nobel). Moreover, the proper test is not whether the "misconduct" was outcome-determinative. *Fraige*, 996 F.2d at 299; *Square Construction Co. v. Washington Metro Area Transit Authority*, 657 F.2d 68, 72 (4th Cir. 1981). The Janiks clearly and convincingly demonstrates prejudice to their right to "fully and fairly" litigate their case. See Doc #443 at 51-68, buttressed by Doc #447 at 3-7 & Tabs A-S.

K. **Amica misstates the legal error on 7th Amendment and other constitutional rights issues.** Petitioners indicated in briefs at the 5th Circuit level (Opening Brief at 49-50; Reply Brief at 25) that 7th Amendment problems resulted from defendants' "misconduct", as the term "misconduct" is defined in Rule 60(b)(3). The main 7th Amendment point, here, is a partial summary judgment error. The trial court unfairly granted partial summary judgment and dismissed several common law counts and dismissed *all* DTPA tort counts (as pled by Janiks against both Amica and IAS/Nobel), yet that pre-trial ruling was tainted by unfair surprises caused by "misconduct". See Petition at 10, and at 11-12, and Doc #443 at Exhibit "A" (alluding to Due Process).

For example, summary judgment phase-withheld evidence (*which was disclosure-mandated by Rule 26(a)(1) and Rule 26(e)(1)*) was needed by the Janiks to oppose the Rule 56 motions. Also, the defendants' improper jury

arguments "rung" a jury-tainting "bell" that could not thereafter be "un-rung". See *Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1993) ***(reversing a jury trial and a Rule 60(b)(3) motion denial, due to tainting the jury by improper closing argument).*** Moreover, the record indicates defense witness collusion, a 5th Amendment Due Process problem. Such withholdings and collusions combined to comprise Rule 60(b)(3) "misconduct" directly deprived the Janiks of any jury trial as to those dismissed counts, – much less a jury trial with opportunity to "fully and fairly" litigate one's case.

CONCLUSION

This Court should issue a writ of certiorari.

Respectfully submitted,

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